IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A6/2012

In the appeal of: 17/2/2016

JOHN MTHIMKULU Appellant

and

THE STATE Respondent

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

17/2/2016 .....
DATE SIGNATURE

JUDGEMENT

DATE OF APPEAL HEARING: 21 FEBRUARY 2013

MONTSHO, AJ (Maumela J concurring)

[1] On the 5th August 2011, the Appellant was convicted on one count of rape, read with the provisions of Section

51(2)(b) of the Criminal Law Amendment Act, No. 105 of 1997 ("the Minimum Sentences Act"), and one of robbery with aggravating circumstances.

[2] On the charge of rape, he was sentenced to 20 (twenty) years imprisonment imposed in terms of Section 51(2) and (3) of the Minimum Sentences Act. On the charge of robbery (of an amount of R150.00) with aggravating circumstances, the appellant was sentenced to 5 (five) years imprisonment. The court *a quo* ordered that the sentences run concurrently, with the result that the sentence imposed was an effective 20 (twenty) years imprisonment.

[3] The court *a quo* further ordered that in terms of Section 276 B(1) and (2) of the Criminal Procedure Act, No. 51 of 1977 (as amended), a non-parole period of 12 (twelve) years was fixed. This means that the appellant would only be considered eligible for release on parole after completion of 12 (twelve) years of imprisonment.

[4] On the date of imposition of sentence on the 22nd August 2011, the Appellant was 73 (seventy three) years old. He had been in custody awaiting trial since his date of arrest, reflected on the charge sheet as the 28th September 2009. By the time he would be eligible for release on parole, he would be 85 (eighty five) years old.

[5] The appellant subsequently applied for leave to appeal against both conviction and sentence. He was however granted leave to appeal in respect of the sentences only, on the 3rd October 2011.

[6] The appellant was legally represented during his trial and in the subsequent application for leave to appeal.

[7] In the court *a quo*, the appellant pleaded not guilty to both counts. On the charge of rape, his plea explanation was that he had sexual intercourse with the complainant, with her consent. He denied the charge of robbery.

[8] The State led the evidence of witnesses, namely the complainant, and her eldest sister, one Ms Togo Maria Matho, as well as one Dr Kayembe, who examined the

complainant on the date of the incident on the 21st September 2009.

[9] The evidence of the complainant can be summarised as follows:

[9.1] on the day of the incident, she went to Nelspruit city for purposes of checking her bank statements at Standard Bank;

[9.2] on her way to the bank, she found the appellant standing next to a Foschini store. He then asked her if she did not need employment, but she replied that she was still a student at school. The appellant then told her that the offer was only for one day, for which she would be paid an amount of R300.00 (three hundred rand). Whilst with him, she saw the appellant approaching a white lady and the two of them talked.

[9.3] the appellant got back to her, and he told her that the person who was her prospective employer was at home. She then accepted the

offer of employment. He suggested that they walk together through the bushes as it was short cut to the houses on the other side of the valley, where her prospective employer's house was;

[9.4] at some point the appellant suggested that they should sit down to rest. She acceded to the request, but whilst sitting there, the appellant suggested that they should have sexual intercourse. She refused and stated that she was still a virgin. She was 19 (nineteen) years old at the time;

[9.5] she ran away but the appellant grabbed her, and she bit him on his hand, but then he hit her with a fist to subdue her and dissuade her from further resistance. The complainant then decided to switch on the video of her cell phone to record the incident;

[9.6] the appellant pulled down her pants and forcefully had sexual intercourse with her without

her consent, and took R150.00 from her trouser pocket, after demanding money from her;

[9.7] after the appellant finished having sexual intercourse with her without her consent, he told her to go and report to her parents that she is a bitch;

[9.8] she sustained injuries to her genitalia, and consulted a medical doctor;

[9.9] the medical report corroborated the complainant's injuries and it was tendered as evidence during the testimony of Dr Kayembe, who testified that he examined the complainant, who was 19 years old at the time and recorded his findings in the J88 medical form;

[9.10] a video of the incident was shown in court.

[10] The appellant's evidence was that:

[10.1] he did meet the complainant on the 21st September 2009, and the two went into the

bushes where they had consensual sexual intercourse;

[10.2] he did not dispute the video footage that was shown in court, but said he was not aware the complainant was recording him. He however denied assaulting the complainant, or demanding money from her.

[11] It is on the evaluation of the aforegoing evidence that the appellant was convicted as stated hereinabove. The aforesaid conviction still stands.

[12] In sentencing the appellant, the court *a quo* considered as an aggravating factor the fact that the appellant had three previous convictions of rape, though they were committed long in the past.

[13] The appellant's counsel, Mr Molobedi, submitted that in imposing sentence the court *a quo* should have looked at the personal circumstances of the appellant. He submitted that this court should impose a lesser sentence of 10 (ten) years imprisonment, 5 (five) of which should be

suspended, thus imposing an effective sentence of 5 (five) years imprisonment. He, however cited no legal authorities in support of this submission.

[14] On the other hand, the respondent's counsel, Mr Kotze, submitted that the appellant's previous convictions on similar charges should be viewed in a serious light.

[15] He argued that there were no substantial and compelling circumstances present in the appellant's case that warranted a departure from the prescribed minimum sentence as contemplated in the provisions of the Minimum Sentences Act. He submitted that an effective sentence of 20 (twenty) years imprisonment is appropriate in the circumstances.

[16] This court, sitting as a court of appeal, is required to consider whether an effective term of 20 (twenty) years' imprisonment is appropriate in the circumstances or whether it is excessive and induces a sense of shock.

[17] I also have to consider whether the period the appellant already spent in custody whilst awaiting trial, and his age,

should be taken into account on the imposition of sentence.

[18] In ***S v Vilakazi 2012(6) SA 355 (SCA),*** the Supreme Court of Appeal, in a judgment delivered by Nugent JA stated the following:

> *"While good reason might exist for denying bail to a person who is charged with a serious crime, it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed".*
>
> **at 376 A - B**

In this case the court ordered that the imprisonment sentence imposed on the appellant had to expire two years earlier than would ordinarily have been the case, i.e. deducting the period spent in custody from the total sentence.

[19] In ***S v Matyityi, 2011 (1) SACR 40 (SCA)***, the Supreme Court of Appeal, per Ponnan JA, stated the following:

"Our Courts derive their power from the constitution and, like other arms of State owe their fealty to it. Our constitutional order can hardly properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

at 53, para [33] d - g

[20] Society cannot be oblivious to the fact that rape is a heinous crime. In ***S v Chapman, ZASCA 45: 1997 (3) SA 341 (SCA)***, the Supreme Court of Appeal stated the following:

> *"Rape is a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim, and that a woman in this country ... have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without fear, apprehension and insecurity which constantly diminishes the quality and enjoyment of their lives"*
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> **at 345, A - B**

[21] The State's evidence was that before raping the complainant, appellant subdued her by hitting her with a fist. In **S v Mnguni, 1994(1) SACR 579(A)**, the court stated the following:

"a cruel and inhuman attack on a helpless unarmed victim is considered to be an aggravating factor"

at 583 E

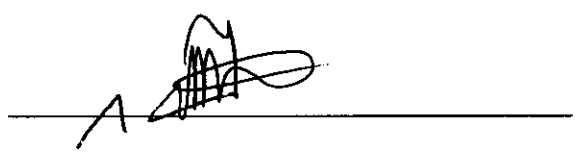
[22] It is trite that in imposing sentence, the personal circumstances of an accused person, as well as the interests of the society, should be taken into consideration. In **S v Rabie, 1975(4) SA 855(A) at 861 D**, the court held that it is trite that sentences imposed on convicted offenders have to be blended with an element of mercy. In *casu*, the appellant had on three previous occasions, after conviction and serving parts of the sentences for rape, been released on parole with particular conditions. In all three instances, appellant had to be re-admitted into custody to serve the remainder of the original sentences that would have been initially imposed on him. He proved a dismal failure in matters of compliance with the law of the land as well as where it regards reformation.

[23] Taking into account the age of the appellant (he was 73 years old at the time of imposition of sentence), and his previous convictions for rape and violation of parole conditions, I am not persuaded that there is still room for his rehabilitation. In fact, I view these factors as being aggravating. This court will therefore be failing in its duty by not removing the appellant from the society for a long time.

[24] I am satisfied that there are no substantial and compelling circumstances that warrant or justify a departure from the sentence prescribed by law. Parliament has spoken, and in the circumstances I am satisfied that the sentence imposed by the court *a quo* is appropriate.

ORDER

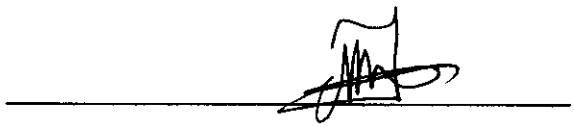
The Appellant's appeal against the sentence is dismissed.



MONTSHO LM

ACTING JUDGE OF THE GAUTENG PROVINCIAL DIVISION (PRETORIA)

I agree



MAUMELA J

JUDGE OF THE GAUTENG PROVINCIAL DIVISION (PRETORIA)

APPEARANCE:

For the Appellant: Adv. M G Molobedi, on instruction by Legal Aid Board, Pretoria

For the Respondent: Adv. J. Kotze, Office of the Director of Public Prosecutions, North Gauteng, Pretoria