IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A396/2014

17/6/2016

Not reportable

Of interest to other judges

Revised.

In the matter between:

JOHANNES MAWASHA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Fabricius J,

1.

This is an appeal against the sentences imposed by Lamont J on 25 April 2013, leave to appeal against the sentences having been granted on the same day.

2.

The Appellant herein had been convicted of the following charges:

2.1 Count 1: Murder: on this count a term of life imprisonment was imposed;

2.2 Count 2: House breaking with intent to rob and robbery with aggravating circumstances: a term of 15 years imprisonment was imposed;

2.3 Count 3: Rape: a term of 15 years imprisonment was imposed;

2.4 Count 4: Rape: a term of 15 years imprisonment was imposed;

2.5 Count 6: Robbery with aggravating circumstances: a term of 15 years imprisonment was imposed.

It was ordered that the sentences on counts 2, 3, 4 and 6 should run concurrent with the sentence on count 1, which means in effect that the Appellant was sentenced to life imprisonment.

3.

For present purposes, a short summary of the evidence follows:

Miss M. testified that she had been the girlfriend of the deceased Fourie. On 10 August 2010, she was at school and the deceased phoned her at about 16h45. It was expected that the deceased would pick her up at about 19h45. She phoned him more or less at that time, but was unable to contact him. Ultimately, she was offered a lift to the house. Upon her arrival, there was no answer from the gardener when she called for him. She saw the deceased' s car and there was a small light on the inside, which was burning, something she could not explain. The inside lights of the house were on, but the outside lights not. She phoned the deceased again without any success. She then went over to the deceased' s vehicle and could see the feet of someone hanging outside the car. They were the feet of the deceased. Someone then came from inside the car and they apprehended her. A gun was demanded from her, as well as money. Two persons were present at the time. They took her to the grass and told her to undress. She refused to do so and was then beaten until she complied. She was then raped. She was then told to go into the house and show the attackers the safe. Her house was in shambles, the safe door was already open, and everything was scattered about. One of the attackers who had not raped her outside, told her to lie on a mattress and she was then raped again. After that, they all went outside again and, and the person who had not raped her the first time, raped her there again, for a long while. She was then taken to the car,

blankets were put on the seat, and she sat there naked. The person who had then raped her the first time, told her to lie down on the blankets and raped her again, repeatedly. She was also forced to commit oral sex at that time.

4.

They took her cell phone, and two Nokia cell phones belonging to the deceased. They also emptied her bag and took the contents. She was then locked in the boot of the car, and later on managed to escape. She went the police where swabs were taken from her. She also later on identified various goods which had been recovered from the house, including her own belongings. She could not, at the time of these vicious assaults, identify the assailants, as each wore a balaclava.

5.

The swab samples were later on analysed and linked with a blood sample taken from the Appellant. It was found that these samples matched.

6.

The Appellant testified and denied any knowledge or participation in the crimes, but obviously on the basis of the DNA-evidence, was found guilty on all the charges, except count 5.

7.

On behalf of the Appellant, it was submitted that the trial Judge misdirected himself when he sentenced the Appellant to an effective sentence of life imprisonment. It was suggested that the sentence was shocking and out of proportion with the facts of this case. The alleged substantial and compelling circumstances, which ought to have led the Judge to impose a lesser sentence than the prescribed sentences, were the following:

7.1. Appellant was 29 years old at the time;

7.2. He had only completed standard 3 at school and had a difficult childhood;

7.3. He had been in custody awaiting finalization of this trial for a period of two years and seven months;

7.4. The complainant in the rape counts sustained no injuries during the incident and no weapon was used during the rape or robbery. The submission in this context was that the honourable trial Judge "misdirected himself in not taking sufficient cognisance of the Appellants personal circumstances and not giving more weight to all mitigating factors and thereby imposing a sentence that is shockingly inappropriate and furthermore not tempering the effect of the term of imprisonment."

8.

I accept that it is Counsel's duty to make such submissions, as can reasonably be made in each case, but that is about all one can say in the present instance. There are a number of issues that have to be kept in mind in the present proceedings. Firstly, it must be remembered that the imposition of a sentence is pre-eminently a matter for the discretion of the trial Court, and on appeal, the sentence imposed should only be altered if an irregularity took place during the trial, or sentencing stage, if the Court materially misdirected itself in some or other manner, or if the sentence imposed by the Court, could be described as shockingly inappropriate.
See for instance: *S v Rabie 1975 Vol 4 SA 855 (A).*

9.

Obviously, an aggravating factor is the prevalence of the offence and its seriousness. In *S v Chapman 1997 (2) SACR 3 (SCA),* the Supreme Court of Appeal said the following at 5 b - c: "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation." This was said by Mahomed, Chief Justice at the time. I agree with those sentiments. ln this context the Court a quo said the following: "When you wear a balaclava you instil a deep sense of fear in the people who see you wear a balaclava. It is difficult from a perspective of a woman to imagine a more repulsive act than a man raping her wearing a balaclava, an act of love is turned

into an act of violence and horror aggravated by the appearance of the rapist. You raped the complainant in the immediate vicinity of her lover who was dead, killed by you. It is difficult to imagine what went through her mind and her emotions when you performed those acts. You also raped the complainant more than once." The Court a quo then dealt with the other facts and referred to the interests of society as well. He did take into account the rehabilitative aspect of a sentence of imprisonment albeit for life, and also referred to retribution. In that context as a whole, the Court said the following: "As I have previously indicated to you, individually these counts would have resulted in more than your lifetime possibly. As to the murder it is not a spur of the moment incident which happened, it is not a matter where you were driven by someone else to do so or one of the other types of murders where you act with significantly reduced moral blameworthiness. Your blameworthiness in this matter is at a maximum, and on the basis of proportionality the maximum punishment should apply."

10.

Counsel for the State further put to us "that rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman and particularly the poor and vulnerable. In our country, it occurs far too frequently, and is currently aggravated by the grave risk of the transmission of AIDS. A woman's body is sacrosanct and anyone who violates it does so at his peril and our legislature, and the community at large, correctly expects our Courts to punish rapists very severely". This dictum emanates from *S v Ncheche 2005 (2) SACR 386 (W) at par. 35.* I agree with the views expressed by that learned Judge. What is furthermore an aggravating fact is that the Appellant acted as part of a group, weapons were used during the commission of the relevant offences and a person lost his life. The deceased and the complainant were attacked in and at their home where they were supposed to feel safe and secure. The Appellant displayed no remorse and the rapes are of the worst kind. The indignity that the complainant on the rape charge has suffered must have been horrendous. There is absolutely nothing to say in the Appellant's favour and the learned Judge a quo, who imposed the relevant sentences, did so justifiably on any possible reasoning. One can only hope that somehow and someday the victim can regain her dignity.

Accordingly, the following order is made:

The appeal against the sentences is dismissed.

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JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

I Agree

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JUDGE W. R. C. PRINSLOO

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

I Agree

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JUDGE N. V. KHUMALO

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

17 JUNE 2016