# IN THE HIGH COURT OF SOUTH AFRICA
# (NORTH GAUTENG HIGH COURT)

Case No: A 872/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 3/3/2016

SIGNATURE

In the matter between:

K.N.M Appellant

and .

The State Respondent

JUDGMENT

Maumela J.

1. In this case, leave to appeal was granted by this court upon petition in terms of section 309 C of the "Criminal Procedure Act" 1977: (Act No 51 Oof 1977). This court has jurisdiction to hear this appeal against both conviction and sentence.

2. Before the regional court for the regional district of the North West, held at Potchefstroom, herein after referred to as the court *a quo,* appellant, who was legally represented, and

was 29 years of age, was charged with three offences of rape in contravention of section 3, read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences and Related Matters Amendment Act 2007: Act No 32 of 2007, read with the provisions of Section 51 and Scheduled 2 of the Criminal Law Amendment Act 1997:(Act No 105 of 1997).

3. Of the three counts charged, two were specific to the appellant only, while in the third count, the allegations were against both the appellant and a co-perpetrator. On counts 1 and 2, the allegations were that upon or about the 12th April 2008, and at or near Tshing in the Regional District of the North West, the accused, did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, MM a 16 year old female, by inserting his, penis into her, (complainant's), vagina without her consent.

4. On count 3, the allegations were the same, save for the fact that it was alleged that the appellant committed that offence with simultaneous participation by a co-perpetrator. At the time of his trial, a search by the police for the co-perpetrator was still underway, but had not yet borne any positive results. Due to the allegations of participation by a co-perpetrator, the state contended that that count 3 makes for what is called 'gang rape', which should invite a harsher sentence.

5. Before the court a *quo,* appellant, indicated that he understands the charges put to him. He pleaded not guilty to all charges. In explaining his plea in terms of section 115 of the Criminal Procedure Act, the appellant stated that sexual intercourse with the complainant was with her,

(complainant's), consent. Appellant was convicted on all the charges. The court a *quo* regarded count 1 and 2 as one for purposes of sentence. In that regard, it sentenced the appellant to undergo 20 (twenty) years imprisonment. In respect of count 3, the appellant was sentenced to undergo 10 (ten) years imprisonment. As indicated above, this appeal is against both conviction and sentence.

**AD CONVICTION.**

6. The state led evidence. Complainant told court that on the day in question, which was a Saturday, at around 20h00, she and a friend known as V, were on the street, en route to church. Along the way, they met the appellant whom the complainant already knew as a friend to one K, who was her .sister's boyfriend. She knew the appellant by the name Sp. She said that appellant was with one G, whom she had seen in the company of K before. The two walked behind them.

7. The two offered them a drink of 'Hansa', a brand of malt beer. When they strove to turn down the offer of drink, the two threatened to beat them. V bolted and appellant having grabbed her, (the complainant), she remained behind and was compelled to drink the beer. She requested Sp to let her go, but he refused, whereupon he dragged her towards his home.

8. While they were already at the appellant's home G, who at some stage chased after V, returned to find the appellant striving to rape her. Once inside the house, Sp, the appellant, pinned her onto the bed. She pushed the appellant off her and he fell against the dressing table. Her efforts to dash to safety were thwarted by G who

blocked the doorway. Appellant asked G to catch her.

9. G pushed and pinned her onto the bed while appellant stripped her clothes off. He also took off his clothes. Appellant then forced her legs open. She threatened to lay charges against appellant and G. Both told her that they do not care. Appellant threatened to kill her if she dares to lay charges. He then inserted his penis into her vagina and had sex with her.

10. After appellant had removed himself off her, G also took off his clothes and lay on top of her. He inserted his penis into her vagina and had sexual intercourse with her. She continued with efforts to brake free. The two compelled ·her to lie between them on the bed. Threatening to kill her, they ordered her never to scream. They told her that nobody would ever know if they killed her.

11. Later towards 4h00, appellant raped her again while G slept. Thereafter she demanded that the two let her go. At around 5h00, appellant opened the door. From the Saturday on which the incident happened, the two released her on a Tuesday. On a Sunday, and a Monday, they locked her into the room. Between 07h00 and 18h00, they left the shack in which complainant was kept. While complainant had not divulged her rape to the police, in court she averred that the two raped her over all the days over which she remained locked in the room.

12. She stated that there are windows on the room in which she was locked, but although the windows have no burglar bars fitted, they are very hard to open. The complainant's evidence was corroborated to a material effect by that of

V her friend. No explanation was advanced for why V, a friend to the complainant, who was in complainant's company on the day she was dragged to the appellant's home, failed to alert the complainant's grandmother about what had befallen the complainant.

13. Despite the fact that complainant was undergoing her menstrual periods, the resultant report did not contradict her allegations of rape. EM, the complainant's grandmother told the court *a quo* that the complainant was in a state of shock when she returned home on a Tuesday. It is for that reason that she summoned complainant's cousin for the latter to witness the state in which the complainant was when she returned home.

14. The appellant averred that the complainant refused to leave his home after his own father requested him to let go of the complainant. On the basis of the evidence adduced before it, the court *a quo* found that the state proved its case beyond a reasonable doubt and it convicted the appellant.

15. In the case of S v Hadebe and Others[1] the court stated the following: *"In the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct and would only be disregarded if the recorded -evidence showed them to be clearly wrong".* While appellant contends that sex with the complainant was consensual, he does not explain why she would have agreed to engage in sexual intercourse within full view of G

[1] 1997 (2) SACR 641 (SCA), at page 645 e – f

16. Appellant also does not explain why he would have been willing to allow G to also have sexual intercourse with the complainant, whom he had taken home for sex. Neither does he explain why complainant would have agreed to engage in sex with two males at the same time. At the same time, nothing in this case suggests that the evidence for the state which served before the court *a quo* was false. As such, the judgment of the court *a quo* stands to be upheld.

**ON SENTENCE**.

17. The .appellant is a first offender. He is 30 (thirty) years of .age. Before his arrest, he was a farm worker, earning R 500- 00 per week. For the offences on which the appellant stands convicted, prescribed minimum sentences stand prescribed. These include imprisonment for life. Appellant had been in custody for over two years before he was sentenced. The state' concedes that the sentence imposed against the appellant is too harsh.

18. In the case of S v Zinn[2] the court stated that a sentencing court has to heed the crime committed, the personal circumstances of the accused, and the interests of the community. In S v Kumalo[3] the court stated: *A Punishment must fit the criminal* as *well as the crime, be fair to society, and be blended with* a *measure of mercy according to the circumstances".*

19. The offences of which the appellant stands convicted are very serious. Rape is a crime that victimizes beyond the physical injuries visible on the body of the victim. In the case

[2] 1969 (2) SA 537 (A),
[3] 1973 (3) SA 697 (A), at 698 a

of S v De Beer[4] (SCA case No 121/04, 12 November 2004), (an unreported judgement), at paragraph 18, the court stated the following: *"Rape is* a *topic that abounds with myths and misconceptions. It is* a *serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is* a *violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost* as *traumatic* as *the rape itself'.*

20. As already indicated, it is an approach in sentencing that sentences meted out to offenders have to be blended with mercy. In S,v Rabie[5], Holmes JA stated: *'Then there is the approach* of *mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is* a *balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal, as well as the crime and being fair to society".* See also S v Harrison[6], where the court stated: *"The concept of mercy has been recognised by the courts of this country. As has been said: "Justice must be done, but mercy; not* a *sledgehammer, is its concomitant".* See also; S v Sparks and Another[7], and S v Banda[8]•

4 (SCA case No 121/04, 12 November 2004). (an unreported judgment at paragraph18).
5 1975 (4) SA 855 (A), at page 861, paragraph D.
6 1970 (3) SA 684 (A), at page 686 A; and
7 1972 (3) SA 396 (A), at page 410 (G).
8 1991 (2) SA 352 (8), at page 354 F.

21. In this case the court *a quo* failed to take into consideration the cumulative effect of the sentences imposed on the appellant. In the case of S v Kruger[9], the court stated: *"The trial* as *well* as *the High Court reasoned that it* was *inappropriate to order the sentences to run concurrently because the offences were committed at different places and on different times. While this may be* a *consideration, it cannot justify* a *failure to factor in the cumulative effect of the ultimate number of years imposed. I believe that sentencing courts ought to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence. I also acknowledge that it is* a *daunting exercise indeed".*

22. Imprisonment over years is a harsh sentence for a first offender. It overlooks the worth of rehabilitation as .a possibility where the appellant is concerned. In *S v Mudau*[10], the Supreme Court of Appeal restated the position thus: *"It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon* a *careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at* a *sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves* a *very high degree of responsibility which should be carried*

[9] 2012 (1) SACR 369 (SCA), at 372 at paragraph [9]
[10] 2013 (2) SACR 292 (SCA) at paragraph 13.

*out with equanimity ……".*

23. In S v Rabie[11] Corbett JA put it thus: *"[a] judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality".*

24. In the result, the appeal against conviction stands to be dismissed. The appeal against sentence must succeed. I therefore propose the following order:

**ORDER**

1. The appeal against conviction is dismissed.

.2. The appeal against sentence is upheld. The sentence imposed against the appellant by the court a *quo* is set aside and it is substituted by the following sentence:

2.1. On count I, the accused is sentenced to undergo 18 (eighteen) years imprisonment.

2.2. On count II, the accused is sentenced to undergo 18 (eighteen) years imprisonment.

2.3. On count Ill, the accused is sentenced to undergo 10

[11] Supra

(ten) years imprisonment.

3. The sentences in count II and Ill shall run concurrently with the sentence in respect of count I.

T. A. Maumela
Judge of the High Court
Gauteng Division, Pretoria.

I agree,

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N. Khumalo
Judge of the High Court
Gauteng Division, Pretoria.