IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A871/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED. ✓

24/5/2017

24/5/17 .....
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In the matter between:

JOHANNES MOKOLOBETSI MASENYA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Fabricius J,

1.

The Appellant was charged in the Regional Court Mokerong with 11 (eleven) counts of rape committed during the period of May 2008 to September 2011.

2.

He pleaded guilty to all charges and a detailed statement in terms of ***Section 112 (2) of the Criminal Procedure Act 51 of 1977*** was provided. The charge sheet on Count 5 alleged penetration of more than once, but the Appellant pleaded guilty to one count, i. e. penetration, and this plea was accepted by the State.

3.

All the complainants were adults at the relevant times, except the complainant on Count 8, who was 15 years old at the time.

4.

The Magistrate imposed a sentence of life imprisonment on all charges after having weighed up all possible mitigating factors. The sentences will run concurrently.

5.

The difficulty raised by the Court a quo itself involved the interpretation of ***Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997***, in terms of which a sentence of life imprisonment is obligatory when committed in circumstances where the victim was raped more than once or when committed "(a) (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions".

6.

The Magistrate said that ***Schedule 2*** in the present context was not clear as far as a person who is commonly referred to as a serial rapist was concerned. ***Part III of the Amendment Act*** as substituted by ***Section 68 of Act 32 of 2007***, and read with the

provisions of ***Section 51 (2) (b) of the 1997 Act*** provides for, in the case of rape, for a first offender, a sentence of imprisonment for a period of not less than 10 years; for a second offender, a period of not less than 15 years, and for a third and subsequent offender, a period of not less than 20 years imprisonment.

7.

The Appellant had a criminal record that reflected that he was found guilty of rape on 3 May 2012 and was sentenced to a term of 6 (six) years imprisonment. The relevant charges in the present case which were put to Appellant on 18 September 2012, related to periods before then as I have said.

8.

The Magistrate regarded this as a previous conviction when considering the appropriate sentence, erroneously so in my view.

9.

It is also clear that the Court sentenced the Appellant to life imprisonment in respect of Count 8 on the basis that the complainant had been penetrated more than once. This is a misdirection in that Appellant had pleaded guilty to one unlawful penetration and the State had accepted that. This limited the *lis* between the State and the accused.

See: ***S v Ngubane 1985 (3) SA 677 (A) at 683.***

10.

The reasoning of the Magistrate in the context of ***Item (a) (iii) of Part 1 of Act 105 of 1997*** is that once an accused is convicted in the same trial and on the same day of multiple counts of rape, then such accused falls within the ambit of such provisions when the Court considers the appropriate sentence on Count 3 and subsequent counts. This is a clear misdirection in my view and cannot reflect the intention of the legislature. At the time of the proceedings, this was simply not the case. In my view, the intention of the legislature as it appears from the express

wording of ***Item (a) (iii) of Part 1 of Schedule 2*** is that such convictions had to have occurred before the proceedings and convictions in a particular trial thereafter. This line of reasoning also appears clearly from the examples given by ***Mpati JA in S v Mahomotsa 2002 (2) SACR 435 at 444***, when the following was said at par. (g) – (i): "Here the accused had been arrested on the first count, appeared in Court where he was released in the custody of his grandmother, but within a period of just over two months he committed a similar offence in almost similar fashion. What must be remembered, however, is that at the time of the second rape, the accused had not as yet been convicted on the first count. Again this is, of course, no excuse. But the Legislature has itself distinguished him from persons who, having been convicted of two or more offences of rape but not yet sentenced, commits yet another rape. If, for example, the accused in the first instance had not raped the first complainant more than once and he then in the second instance raped the second complainant only once while awaiting trial on the first count the prescribed sentence of life imprisonment would not have come into the reckoning".

11.

Shortly before the hearing of this appeal, Counsel for the State provided additional Heads of Argument and referred us to an unreported decision of this Division in ***T. P. Magabara v The State Case Number A800/15***, delivered on 24 March 2017, per Mali J and Khumalo J concurring. The Appellant therein had been sentenced to life imprisonment in respect of three counts of rape. The issue for determination was whether the trial court had correctly interpreted the provisions of paragraph (a) (iii) of ***Schedule 2 to Act 105 of 1997***. The argument adopted by the trial Court, and accepted on appeal, was that (amongst others), as here, when an accused has been convicted on 2 counts of rape, but not yet sentenced, when there are three or more counts of rape in issue, the provisions of the mentioned paragraph (a) (iii) of ***Part 1 to Schedule 2*** apply. As said, this approach is not justified by a proper interpretative exercise, and it is clearly wrong and should not be followed.

12.

In the present proceedings, there was also a debate whether or not the Appellant had been sufficiently warned about the possible imposition of a life sentence. All the charges referred to the provisions of Section 51 (2) and ***Schedule 2*** of the said ***Act of 1997***. The Magistrate also referred to the provisions of Section 51 (1) and ***Schedule 2*** in respect of Counts 5, 8 and 11, and the possibility of a life sentence. The Appellant was not prejudiced by any possible criticism relating to a failure to explain to him that life sentences could also be imposed on counts other than Count 8 in respect of which the prescribed minimum sentence was clearly life imprisonment, and to which he had pleaded guilty in any event. In *hoc casu* the Appellant would therefore not have conducted his defence differently.

See: ***Moloi and Others v Minister for Justice and Constitutional Development 2012 (20 SACR 78 (CC) at par. 19.***

In the absence of any prejudice in this context, it is not necessary to deal further in more detail with this complaint against the proceedings which was in any event not even raised as a ground of appeal.

13.

As the result of the cumulative effect of the misdirections, we are at liberty to set the sentences aside when the imposition was not justified by law. Appellant is entitled to be sentenced on each count separately, taking into account the relevant statutory provisions, and of course the question whether any compelling and substantial mitigating circumstances exist. None exist in this case. Each victim is entitled to her self-respect and dignity and there is no reason not to impose the minimum sentence in respect of each count.

14.

For the sake of clarity, the following sentences are therefore imposed in the place of the life sentences imposed on each count by the Court a quo:

14.1 In respect of Counts 1, 2, 3, 4, 5, 6, 7, 9 and 11: Ten years imprisonment on each count;

14.2 In respect of Count 8, the rape of a minor, life imprisonment;

14.3 The sentences referred to in paragraph 14.1 are to run concurrently with the sentence imposed in paragraph 14.2.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

I Agree

JUDGE P. RABIE

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

I Agree

JUDGE F. LEGODI

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

19 MAY 2017

Case Number: A871/2012

Attorney for Appellant: Ms M. B. Moloi

Counsel for Respondent: Adv A. Coetzee

Instructed by: The State Attorney

Date of hearing: 19 May 2017

Date of judgment: 24 May 2017