

(Inlexso Innovative Legal Services) nl

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC40/2019

DATE: 2020/03/23

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES : NO (3) REVISED: 2020/09/02

10 In the matter between

THE STATE

and

THEMBA SITHOLE

Accused

S E N T E N C E

JOHNSON, J: According to the provisions of section 51 (1) of the Criminal Law Amendment Act 105/1997 ("The Act"), a High Court shall sentence a person who has been convicted of an
 20 offence referred to in Part I of schedule 2, to life imprisonment. Part I of Schedule 2 includes amongst others rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, involving the infliction of grievous bodily harm.

According to the provisions of section 52 (2) a High Court

shall sentence a person who has been convicted of an offence referred to in Part II of schedule 2, to imprisonment of not less than 15 years imprisonment in the case of a first offender, and 20 years in the case of a second offender. Part II includes amongst others robbery where there are aggravating circumstances. These provisions are subject to subject to subsections (3) and (6).

When a Court is faced with such a situation it has no discretion but to impose the mandatory prescribed sentences
10 unless in terms of Sub-section (3) substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The onus to prove substantial and compelling circumstances lies with an accused person and must be proved on a balance of probabilities. Sub-section (6) does not apply because you were not under the age of 16 years when you committed the offences.

In par 6 of your admissions Exhibit B, you admitted the contents of the Medico-Legal Examination, the J88, pertaining to the injuries that the complainant sustained after
20 you had raped her. The doctor described multiple injuries which he concluded were caused by blunt assault, not excluding an attempted strangulation. It is clear that the rape involved the infliction of grievous bodily harm.

The infliction of grievous bodily harm is also an aggravating circumstance as far as the robbery charge is

concerned.

To avoid being sentenced to life imprisonment for rape, and a minimum of 15 years imprisonment for robbery with aggravating circumstances, you have to prove that substantial and compelling circumstances exist which would warrant the court from deviating from those sentences.

Courts must be aware of the facts that the Legislature has prescribed certain sentences for certain serious crimes. These sentences must be imposed in the absence of
10 substantial and compelling circumstances, so as to illicit a standardized and consistent response from the courts. See *S v Malgas* 2001 (1) SACR 469 SCA.

When considering a sentence, your personal circumstances, the interest of society and the offences are taken into account. Due weight must be given to each of these, without over- or under emphasizing any of them. The court must also ensure that it blends its sentence with a measure of mercy.

You are 40 years of age and not married. You have no
20 dependants and reached grade 11 at school. Your mother is deceased and your father a pensioner. You are unemployed.

The two offences of which you have been found guilty of, is so serious in nature that the Legislator has prescribed certain minimum sentences in an attempt to curb the violence in the community. Unfortunately, it has not had the

desired effect because these violent crimes are on the increase. The complainant is regarded as part of the vulnerable groups in society. Violent persons like you have no respect for vulnerable groups and go about their crimes unperturbed by the interests of society. When you raped and robbed the complainant, you had no regard for her safety and wellbeing. You disregarded the fact that she is an elderly lady, 75 years of age in fact, nearly twice your age, and you seriously assaulted her to get your way.

10 She testified today, and it was noticeable that she is a small, frail, elderly lady. She testified that this incident changed her life. She was active in the community and rendered various services before this incident, but she had to stop it due to the attack.

This incident has caused her embarrassment and she is now avoiding contact with other people. As a result of the incident she got shingles which in itself was an embarrassment to her.

20 This incident has emotionally scarred her and it will take a long time to recover. The reckless way in which you disregarded her life is evident from the fact that you raped her without using a condom.

This caused her to frequently visit the hospital for blood tests.

The community is entitled to demand that those who

perform these perverse acts be adequately punished, and a clear message must be sent to society, both by Parliament and Courts alike, that serious crimes will be punished severely. (See *S v M* 2007 (2) SACR 60)

In *DPP North Gauteng v Thabete* 2011 (2) SACR 567 (SCA) at 577g the Court stated as follows:

10 “Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our recent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society.”

More often than not victims die or are seriously injured by the indifference to their safety by criminals like you.

20 Robbery is also a serious crime which also cause victim serious injuries or loss of life. It is taken into account that the robbed items were recovered, but that was not as a result of anything from your side. It was recovered after you were involved in an accident with the vehicle that you robbed from the complainant. You caused her unnecessary damage to her property.

It is an aggravating factor, that you have not learnt

from your previous brushes with the law. You have 3 similar previous convictions of which the last two have elements of violence. For the last two offences of housebreaking with the intent to rob and robbery, you were cumulatively sentenced to 15 years imprisonment on 28 January 2010. About halfway through the sentence on 19 June 2017, you were released on parole until 27 July 2024. About 14 months after you release and while still on parole, you struck again, and unfortunately the complainant fell prey to your evil deeds.

10 Parolees are becoming a huge problem in our society and the number of them that fall back to committing crimes, is alarming. There is a problem in our parole system which has to be addressed sooner rather than later. Fortunately, the Minister of Justice and Correctional Services has taken the lead in addressing the problem.

 Adv Mtsweni has argued that you have remorse. This court does not believe that you have. You never took the witness stand and took the court and the community into your confidence as to what motivated you to commit these
20 crimes. One would expect of a remorseful person to take the Court and the community into his confidence and play open cards as to the reasons for his behaviour. You have not done so.

 Although you made formal admissions which boiled down to a plea of guilty, and that you mentioned therein that

you ask for forgiveness for what you had done, that in itself is not enough to indicate that you have real remorse to be taken into account as a mitigating factor. It seems that the evidence, which included DNA evidence, was so overwhelming that you had no other choice but to plead guilty. Mere acknowledgement of guilt is an empty gesture and cannot be regarded as true remorse.

Adv Mtsweni has also argued that the fact that you have pleaded guilty should be seen as a substantial and
10 compelling circumstance. The fact is that you did not plea guilty. It was obvious that you made admissions when you heard the nature of the DNA evidence, which would obviously afford you no route of escape. He also argued that you consumed alcohol. It is quite clear that you only consumed alcohol after you had robbed it and after you raped the complainant. He also argued that the robbed items were recovered. I have already addressed this. Cumulatively there are no substantial and compelling reasons which entitles me to deviate from the prescribed minimum
20 sentences.

You are a danger to society and should be removed in the interest of the safety of all of us.

After consideration, I am of the view that the following sentences are appropriate:

Count 3: Rape read with section 51 (1) of the Criminal Law Amendment Act 32 of 2007: Life imprisonment;

Count 4: Robbery read with section 51 (2) of the Criminal Law Amendment Act 32 of 2007: 20 years imprisonment.

Advocate Mtsweni has not advanced any reasons why the Court should find that you are not unfit to possess a firearm; therefore, in terms of section 103(1) of Act 60 of 2000 the Court makes no finding. That means that you are now
10 automatically unfit to possess a firearm.



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PJ JOHNSON

ACTING JUDGE OF THE HIGH COURT

DATE: 2020/09/02