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REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

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DATE SIGNATURE

CASE NO: A268/2017

In the matter between:

SIMELANE, PHELANE ERNEST Appellant

and

THE STATE Respondent

JUDGMENT

Headnote – appeal against sentence – conviction against sentence of … for robbery rape – trial court convicted the accused and sentenced them to life imprisonment for rape and 15 years for robbery – they sentences were not ordered to run concurrently – appeal dismissed and sentences confirmed with rider that they run concurrently.

SUTHERLAND J:

Introduction

[1] This appeal is against sentence only. A petition for leave to appeal on the conviction was refused and allowed only on the sentence. The appellant was convicted in the Regional court on four counts of rape and one count of aggravated robbery. On the rape counts, taken together, he was sentenced to life imprisonment. On the robbery count, he was sentenced to 15 years imprisonment.

[2] The appellant, with three other men, were charged that on 14 August 2009 in the vicinity of Birchacres they each raped a woman, M. S., and robbed her of her wallet, a plastic bag containing goods, and her clothing. The provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 about minimum sentences were applicable as was section 3 of Act 32 of 2007 about the crime of rape.

[3] The appellant was legally represented throughout the trial.

The relevant facts about the crime

[4] Ms S. was, at the time, 29 years old. She was waiting for a taxi. She was dressed in jeans, a vest and t-shirt and shoes. She had a cell, a wallet with some money in it, and a plastic bag containing cups, mugs, her identity document and clothes.

[5] Five men in a red corolla offered her a lift. They squeezed into the front passenger seat along with a man who would later be designated Accused no 1. The appellant, designated as Accused No 3, by inference was in the back of the car.

[6] Instead of dropping her at the indicated spot they drove on, ultimately up a dead-end street to access open veld. Whilst in the car, she was threatened by one of them behind her with a firearm. Which of the Accused did so is unknown. Her cell was demanded. She gave it. When she denied she had money she was hit on the head with the firearm. She struggled against her assailants in vain.

[7] In the veld she was ordered to undress. When she refused, her clothing was forcibly removed.

[8] All five of them raped her. One of them, after intercourse used her t-shirt to wipe himself and then flung the garment at her.

[9] The fifth assailant who was not on trial because he had pleaded guilty earlier and gave evidence as an accomplice, said that he was about to rape her again when they

became aware that someone was coming to investigate. Dogs had been barking at a house about 40 m away and they saw a torch shining into the darkness.

[10] They thereupon abandoned her, naked, in the veld and hurried away in the car. It was this fortuitous interruption that spared her being raped yet again.

[11] Ms S. took the t-shirt, the only item of her belongings that they left behind and drew it up over her bottom to serve as a modicum of cover. She made her way towards the houses and was taken in by one, Mrs Engelbrecht, the householder whose dogs had been barking, and given a blanket. Mrs Engelbrecht's evidence was that she was distraught and traumatised.

[12] The Accused were apprehended shortly thereafter because the Engelbrechts' had seen the Corolla depart and had taken the registration number. The police traced the accused persons from that information.

[13] The appellant's evidence was a denial of presence. The 5th assailant's evidence alluded to the appellant taking the cell from Ms S.. Other than that piece of information and the fact of the rape, no specific conduct by the appellant can be discerned from the evidence accepted by the Regional Court.

The Sentence

[14] All the accused were in their late twenties when the crimes were committed. The appellant was 28. There is no indication that one dominant personality influenced the others.

[15] The appellant's denial of involvement persisted and as such there is no room for any remorse to have been shown. Ms S. had been subjected to further aggravating indignities in addition to the multiple rapes. The tossing of the soiled t-shirt at her was an act of contempt of her humanity. Moreover, leaving her naked added to her trauma. Her pitiful efforts at preserving her modesty by wearing the soiled t-shirt to cover her private parts was yet another excruciating indignity.

[16] The appellant has no previous convictions.

[17] At trial the appellant gave no direct evidence bearing on an appropriate sentence. However, a pre-sentencing report had been prepared in which his personal circumstances are traversed.

[18] Apparently, he is the last of nine siblings who grew up in a stable family environment. He matriculated in 2002. He got a Driver's licence in 2005. He was working as a plumber's assistant, earning R750 pm at the time of his arrest. The family think the conduct attributed to him is out of character and his former employer heaps praises on his work ethic.

[19] At the time of the conviction, some four years after the incident, during which he was on bail, he was cohabiting with a woman who is the mother of his three-year child. He also has two other children, aged 7 and 4 years of age. Each of them has a different mother. To what extent he can materially have offered financial support to all or any of these mothers and children must be answered by a logical inference which is negative.

[20] A victim impact report was adduced. Ms S. was still struggling to come to terms with her ordeal in 2013. she remains chronically apprehensive. Mercifully, her husband and her family are supportive. she has two young children to support and protect. She continues to receive counselling for her experience.

[21] The provisions of section 51, read with part I of Schedule 2, require a person who was convicted of rape, where the victim was raped more than once, whether by that person or by any co-perpetrator or accomplice, to be sentenced to imprisonment for life. Section 51 (2) (a) read with part II of schedule 2 requires a first offender who commits a robbery with aggravating circumstances to be sentenced to fifteen years imprisonment. The use of a firearm, as found by the court *a quo*, satisfies that criterion.

[22] What circumstances in the case of the appellant could constitute a substantial or compelling reason to impose lesser sentences other than those prescribed? The information about the crime and about the personal circumstances summarised above offer, on balance, no foundation for such a decision. Indeed, if anything, the appellant appears to have a sound grasp of responsibility when that is to his advantage in the

work environment. By contrast, in regard to the women in his life, he appears to evidence quite the contrary disposition. His participation, with four other mature men, in the abduction, robbery and rape of a defenceless woman speaks to an attitude towards women that is wholly at odds with any civilised instinct. He and his co-perpetrators dealt with the victim as a mere commodity to be harvested for their gratification and discarded when done with. Those factors such the appellant being a first offender, being in custody for 16 months and being able to hold down a job which, in general, inure to the advantage of an accused person are outweighed by the conspectus that is presented on a holistic evaluation. The trial court was criticised for being inarticulate on this aspect, but regardless of the incoherence of the remarks made, it was correct to conclude that it was appropriate to impose the prescribed sentences in the case.

[23] In my view, the sentences were wholly appropriate. However, it is not clear from the text of the order that the two sentences are to run concurrently. If that was not the intention of the court *a quo,* that effect would have been inappropriate. the two offences were committed as part and parcel of the same ongoing incident. An effective sentence of life imprisonment, subject to the statutory parole regime, is appropriate.

The order

1. The appeal is dismissed.
2. The sentences imposed are confirmed, which shall run concurrently.

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Sutherland J
Judge of the High Court,
Gauteng Local Division, Johannesburg

I agree.

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Wentzel AJ
Acting Judge of the High Court,
Gauteng Local Division, Johannesburg

Hearing: 20 February 2018

Delivered: 22 February 2018

For the appellant:

Adv A H Lerm,

instructed by Legal Aid South Africa.

For The State:

Adv L R Surendra,

of the National Prosecuting Authority