



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, DURBAN  
NORTH EASTERN CIRCUIT LOCAL DIVISION**

CASE NO. CCD6/2017

In the matter between:

**THE STATE**

**and**

**MZWANDILE KHOMBA NXUMALO**

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**JUDGMENT ON SENTENCE**

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**STEYN J**

[1] The accused has been convicted on nine counts, two counts of kidnapping, five counts of rape, possession of suspected stolen property<sup>1</sup> and using a motor vehicle without the owner's consent.<sup>2</sup> The factual matrix supporting these convictions is set out in the judgment on the merits.

[2] In deciding upon an appropriate sentence I am obliged to have regard to the objectives of punishment, i.e. deterrence, prevention, retribution and reformation. The traditional circumstances that should play a role at sentencing have been stated in *S v Zinn*.<sup>3</sup>

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<sup>1</sup> Contravening s 36 of the General Law Amendment Act 62 of 1955.

<sup>2</sup> Contravening s 66(2) read with s 89(1) of the National Road Traffic Act 93 of 1996.

<sup>3</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

[3] The rights of victims should also be taken into account and have been acknowledged by the South African Law Commission in its report of 2000:

'Individual decisions are announced to a critical public who analyse them against a variety of expectations. They not only ask whether the sentences express public condemnation of the crime adequately and protect the public against future crimes by the reform and incapacitation of offenders and by the deterrence of both the individual offender and other potential offenders, but also whether the sentences are just in the sense that similar sentences are being imposed for offences that are of equal seriousness or heinousness.'<sup>4</sup>  
(My emphasis.)

[4] South Africa adopted the Service Charter for Victims of Crime in 2007.<sup>5</sup> Section 299A of the Criminal Procedure Act 51 of 1977<sup>6</sup> underlines the philosophy of restoring the rights of victims and clearly recognises that victims have the right to be informed of an offender's parole consideration. More importantly, they have the right to make representations with regard to an offender's parole decision.<sup>7</sup> Despite this

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<sup>4</sup> See Project 82 (Nov 2000) para 1.2.

<sup>5</sup> Hereinafter 'Victims' Charter'.

<sup>6</sup> Hereinafter 'the Act'.

<sup>7</sup> Section 299A of the Act reads:

- '(1) When a court sentences a person to imprisonment for-
- (a) murder or any other offence which involves the intentional killing of a person;
  - (b) rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
  - (c) robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved;
  - (d) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
  - (e) kidnapping;
  - (f) any conspiracy, incitement or attempt to commit any offence contemplated in paragraphs (a) to (e); or
  - (g) offences as provided for in section[s] 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013,

it shall inform-

- (i) the complainant; or
- (ii) in the case of murder or any other offence contemplated in paragraph (a), any immediate relative of the deceased,

if he or she is present that he or she has a right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.

- (2) If the complainant or a relative intends to exercise the right contemplated in subsection (1) by making representations to or attending a meeting of the parole board, he or she has a duty-
  - (i) to inform the Commissioner of Correctional Services thereof in writing;
  - (ii) to provide the said Commissioner with his or her postal and physical address in writing; and
  - (iii) to inform the said Commissioner in writing of any change of address.
- (3) The Commissioner of Correctional Services shall inform the parole board in question accordingly and that parole board shall inform the complainant or relative in writing when and to whom he or she may make representations or when and where a meeting will take place.

statutory recognition, these rights remain hollow and non-existent unless the prosecution service ensures that victims are present at court when an accused is sentenced to imprisonment on one of the categories of crime as per s 299A(1)(a) to (g).

[5] The aforesaid section recognises formally that victims have fundamental rights that should be upheld throughout the criminal justice process. Courts are obliged to inform the victims of these categorised crimes of this right. As much as courts are compelled to inform victims of their right to make representations, the implementation of this section causes a practical problem, since presiding officers are not in control of the victims' details that testified before them. It is the office of the DPP that has such details and who should give meaning to the rights of the victims listed in s 299A and who has a duty to develop a policy that gives effect to the legislation. In my view, the National Prosecuting Authority's Code of Conduct, s 2(c) requires of prosecutors to:

'consider the views, legitimate interests and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and endeavour to ensure that victims and witnesses are informed of their rights, especially with reference to the possibility if any of victim compensation and witness protection.'

[6] It is therefore of paramount importance that the office of the DPP, without delay, develop a policy that would enable prosecutors not only to comply with the obligations and duties listed in the Code of Conduct but also to give effect to s 299A of the Act, which is aimed at serving the interests of victims of crime. In this matter, the sentencing of the accused was delayed because no arrangement was made by the State to have the victims present at the sentencing phase. Both the victims were present at the next date of sentencing and have been informed of their s 299A rights.

[7] It is common cause that the Criminal Law Amendment Act 105 of 1997 finds application in counts 6, 7, 9 to 11 and that the prescribed sentence is life

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- (4) (a) The Commissioner of Correctional Services must issue directives regarding the manner and circumstances in which a complainant or relative contemplated in subsection (1) may exercise the right contemplated in that subsection.  
 (b) Directives issued under paragraph (a) must be published in the *Gazette*.  
 (c) Before the directives issued under paragraph (a) are published in the *Gazette*, the Commissioner of Correctional Services must submit them to Parliament, and the first directives so issued, must be submitted to Parliament within three months of the commencement of this section.  
 (d) Any directive issued under paragraph (a) may be amended or withdrawn in like manner.'

imprisonment unless substantial and compelling circumstances exist which would justify a lesser sentence. In deciding upon the facts before me I shall take due cognisance of the Supreme Court of Appeal's approach and the Constitutional Court's in determining whether the circumstances of the accused are substantial and compelling.<sup>8</sup>

[8] In a number of sentencing judgments little more than lip service has been paid to *S v Malgas*. I align myself with the words of Ponnann JA (para 23) in *S v Matyityi*:<sup>9</sup>

'As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'

(My emphasis.)

[9] The evidence relating to the rapes shows that the accused, a mature man aged 35 years old, lured the complainants into his taxi and instilled fear into them. In the case of Ms Q, he placed a bush knife on her back and in the case of Ms Z, he resorted to violence by slapping her when she was not prepared to give in to his sexual demands. These rapes that occurred repeatedly call out for severe punishment in the light of the degree of culpability as displayed by the accused. Both victims were young, 19 and 20 years old in 2016, both slender in build, and most certainly at a disadvantage given the accused's physique and the fact that he had dangerous weapons in his possession on all of the occasions.

[10] In deciding upon the severity of the crimes it is apposite to be reminded of the Supreme Court of Appeal's view on rape, as stated in *S v SMM*:<sup>10</sup>

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<sup>8</sup> See *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Dodo* 2001 (1) SACR 594 (CC) at 602-603; *S v Blignaut* 2008 (1) SACR 78 (SCA) para 3 and *S v Nkunkuma & others* 2014 (2) SACR 168 (SCA) paras 9 and 10.

<sup>9</sup> *S v Matyityi* 2011 (1) SACR 40 (SCA).

<sup>10</sup> *S v SMM* 2013 (2) SACR 292 (SCA) para 17.

'It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way. In *S v Vilakazi* Nugent JA referred to the study done by Rachel Jewkes and Naeema Abrahams on the epidemiology of rape which concluded on the available evidence that "women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all human rights in South Africa".'

(Footnotes omitted)

[11] The following personal circumstances of the accused were placed before this court. He is 35 years old, has a grade 10 qualification and is the father of eight children whose ages range between 18 and 2 years<sup>1</sup> old. In the witness stand he expressed his remorse to the victims, the community at large as well as to his previous employer, who was the complainant in count 12. The accused is a first offender. Mr *Madondo* however conceded that the number of rapes committed over a period of time neutralised to a certain degree the accused's clean criminal record.

[12] Mr *Madondo* has submitted that the court should deviate from the prescribed sentences, based on the remorse expressed, the potential of the accused to be rehabilitated and the fact that the accused is a first offender.

[13] Mr *Ludick*, on behalf of the State, has asked that this court impose life imprisonment and argued that the remorse came too late to make a difference to any of the victims. The following factors in aggravation were highlighted by the State, namely that these victims were raped not once but in the case of Ms Z twice and Ms Q thrice. Both of them suffered at the hands of the accused, physically as well as psychologically. No evidence was however placed before this court as to the extent of the psychological harm suffered. During their testimonies earlier in the trial, it was evident that they were still emotional and upset about what had happened.

[14] This brings me to the remorse expressed by the accused. As much as he tendered an apology, he did not spare these victims from a trial. He persisted in his claims of innocence and they both had to endure secondary victimisation at his hands. The record speaks for itself.

[15] It is necessary in the light of the accused's conduct throughout the trial to determine whether the remorse uttered is sincere and genuine. When the accused was asked by the Mr *Ludick* to explain why he did what he did to the complainants, he responded by saying a demon came over him. This is in my view simply an attempt to shift blame and lacks accountability.

[16] Remorse in my view should be noticeable from the conduct of the accused. It has been described by Ponnann JA in *S v Matyityi supra* para 13:

'Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him, and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.'

(Footnotes omitted. My emphasis.)

[17] As can be gleaned from the trial proceedings and the accused's own evidence, he considered himself not guilty until he was convicted. Whilst it is acknowledged that he, as of right, may challenge any conviction, it cannot be found, given the circumstances and facts of this case, that he was truly remorseful before this court.

[18] Having considered all of the facts, those in mitigation and aggravation, I am not persuaded that there are substantial or compelling circumstances to detract from the prescribed minimum sentences. I am also not of the opinion that the prescribed minimum sentences are disproportional to the crimes concerned.

[19] The accused is sentenced as follows:

Count 4: Three (3) months' imprisonment.

Count 5: Twelve (12) months' imprisonment.

Counts 6 and 7: Taken as one for purpose of sentence: Life imprisonment.

Count 8: Twelve (12) months' imprisonment.

Counts 9 to 11: Taken as one for purpose of sentence: Life imprisonment.

Count 12: Three (3) months' imprisonment.

In terms of s 103 of Act 60 of 2000 the accused is declared unfit to possess a firearm.

### **Order**

It is ordered that a copy of this judgment be sent to the Director of Public Prosecutions, KwaZulu-Natal.

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STEYN J

Counsel for the State:

Mr A Ludick

Instructed by:

The Director of Public Prosecutions

Counsel for the accused:

Mr SB Madondo

Instructed by:

Legal Aid Board

Judgment handed down on:

22 October 2018