JUDGMENT (1 NOVEMBER 2019)

MOSSOP AJ The appellant was charged with a count of rape and a count of robbery with aggravating circumstances. He was only convicted on the count of rape for which he was sentenced to life imprisonment. He appeals against his conviction and sentence.

Both charges that the appellant initially faced had their genesis in events that occurred on the morning of 17 February 2008 at or near the Bluff when a married woman, MW (henceforth 'the complainant'), was robbed and raped in a public toilet near Brighton Beach. Two men were involved in the robbery and two men were involved in the rape.

In delivering his judgment in the court *a quo* the learned regional magistrate concluded that he was unable to find that the two individuals who robbed the complainant were the same two individuals who raped her. I consider this to be a lucky break for the appellant as there can be very little doubt in my view that the robbers and the rapists were one and the same people.

Before considering the evidence it is necessary to note that the record of the first day of hearing, which included the evidence of the complainant, was lost. It is most unfortunate that this happened. However, the learned regional magistrate, together with the other roleplayers in the trial who were available reconstructed the first day of evidence in accordance with decided authority. I am satisfied that the reconstructed record is adequate for the purposes of considering the appellant's appeal.

As regards the evidence led at the trial, the evidence of the

complainant did not implicate the appellant. She was called to establish that the act of rape and robbery had occurred. She testified that she held her hands over her eyes while she was being raped and as a consequence she was unable to identify who the rapists were. That she was raped was confirmed by a doctor who examined her at Addington Hospital later on that day. The doctor noted in the J88 medical report that he completed that the vestibule to her vagina was swollen and certain tears to her vagina existed at the two o'clock and the four o'clock position. He also indicated that he took swabs from her vagina for the purpose of testing.

Other than the oral evidence of the member of the South African Police Services that related to a portion of the chain of evidence regarding the specimens taken from the complainant, no other oral evidence was led at trial.

How the appellant became linked to this particular crime was as a consequence of him being arrested for a similar matter which also occurred at the same public toilet. The investigating officer in the second matter had a sample of blood taken from the appellant for forensic analysis purposes. He requested that the samples taken from the complainant in this matter be compared with the specimen he caused to be taken from the appellant because of the similarity between the two offences. A subsequent DNA comparison test confirmed that the material contained in the swab taken from the complainant matched the DNA of the appellant.

A series of documents was handed in by consent showing the complete chain of how the samples taken from the complainant and the appellant respectively were dealt with as they progressed from the extraction

from those individuals to their arrival at the forensic laboratory and their subsequent analysis.

The appellant chose not to testify in his defence and called no witnesses.

In due course the learned regional magistrate convicted the appellant on the charge of rape and acquitted him on the count of robbery.

The sentence imposed on the rape charge was, as stated, that of life imprisonment.

By virtue of the sentence the appellant was entitled to an automatic appeal of both his conviction and sentence. For some reason, this appeal was never advanced and we are now some ten years after conviction dealing with the automatic appeal.

The basis of the appellant's appeal may be found in a manuscript notice of application for leave to appeal that the appellant either prepared himself or caused to be prepared on his behalf and in the heads of argument delivered on his behalf. I shall deal with the contents of both documents but commence first by considering the manuscript notice of the application for leave to appeal.

In that document the appellant states that –

(1) He committed the offence whilst he was intoxicated;

(2) There was no evidence that he forced the complainant to have sexual intercourse with him;

(3) The sentence imposed upon him was unreasonable because he pleaded guilty to the offence as an indication of his remorse;

(4) He spent two years in custody pending his trial; and

(5) He was youthful at the time of the commission of the offence.

Dealing with each of these issues, firstly, there was no evidence that the appellant was under the influence of intoxicating liquor at the time of the commission of the offence. It was never mentioned at all. It could not have been as the appellant himself did not testify. Secondly, as regards there being no evidence that the appellant forced the complainant to have sexual intercourse with him, such argument is disingenuous. A knife was produced prior to the rape in order to secure the compliance of the complainant. The appellant surely cannot contend that the complainant, a married woman, voluntarily chose to have intercourse with him and his co-perpetrator who were strangers to her on the floor of a public urinal early in the morning. Such a contention is simply outrageous and is evidence of the fact that the appellant has a distorted sense of what happened. Thirdly, contrary to what is stated in the notice of application for leave to appeal, the appellant did not plead guilty to the offences with which he was charged. He pleaded not guilty, as the J15 form indicates. Had he pleaded guilty to the robbery charge there is every likelihood that he would have been convicted on that charge, not acquitted. Fourthly, the contention that the period spent awaiting trial is a mitigating factor is an issue common to both the notice of application for leave to appeal and the heads of argument and will be dealt with later in this judgment when dealing with the argument advanced in the heads of argument. Fifthly, the age of the appellant, which appears to have been twenty-eight at the time of this trial, does not establish the appellant to be unduly youthful.

In short, the issues raised in the notice of appeal lack substance and are unpersuasive.

As regards the points raised in the appellant's heads of argument they are –

(1) That the appellant did not receive a fair trial as he did not have legal representation;

(2) That there was no reason why the appellant's version which was apparently contradictory to the State's version should have been rejected by the court *a quo*;

(3) That the charge sheet did not disclose why the provisions of Part I of Schedule 2 to Act 105 of 1997 was applicable and that the learned regional magistrate erred in concluding that it fell within Part I of Schedule 2;

(4) That there were strong mitigating circumstances primarily to be found in the appellant's personal circumstances and the time that he spent in custody awaiting trial; and

(5) That the sentence induced a sense of shock as the rape was not the worst kind of rape.

Each of these submissions are considered.

Dealing with the first point, prior to the trial commencing the appellant had applied for and had been granted legal representation by the Legal Aid Board. He was, however, dissatisfied for an undisclosed reason with the attorney who was assigned to his matter and when the trial commenced he stated that he did not wish to be represented by that particular attorney. The

attorney accordingly applied to withdraw from the matter. Such application was granted. Prior to the Legal Aid attorney being permitted to withdraw he indicated to the learned regional magistrate that he had informed the appellant of the possible application of the minimum sentence in the matter. The possibility of the minimum sentence being applied was also drawn to the appellant's attention by the learned regional magistrate prior to the Legal Aid attorney being permitted to withdraw.

The appellant said that he understood this and stated that he did not wish to employ a private attorney but that he would like to be represented by another Legal Aid attorney other than the one already assigned to his case by the Legal Aid Board. The learned regional magistrate explained to the appellant that he would not be able to choose the specific identity of the Legal Aid attorney assigned to represent him but had to be represented by whichever attorney was assigned to his matter by the Legal Aid Board.

The entitlement of a person charged to be represented, if necessary, by a legal practitioner at public expense is an important safeguard of fairness in the administration of criminal justice. Although the right to choose a specific legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations (see *S v Halgryn* 2002 (2) SACR 211 (SCA) at paragraph 11). The Constitutional Court has endorsed this view, stating that the right embodied in Section 35(3)(f) of the Constitution does not mean that an accused person is entitled to the legal services of any counsel he or she chooses regardless of his or her financial situation. Financial constraints necessarily play a role and

competing needs and demands have to be balanced, more so where the entity providing the legal services is the Legal Aid Board with its limited budget (see *Fraser v Absa Bank* 2007 (3) SA 484 (CC) at paragraph 68).

The learned regional magistrate was correct in advising the appellant as he did. The appellant indicated that he understood this and that in those circumstances he would conduct his own defence. When a person chooses to represent himself the desirability of legal representation should be explained to him or her (see *S v Radebe, S v Mbonani* 1988 (1) SA 191 (T) 195B). After all, even an intelligent and educated layman has small and sometimes no skill in the science of law. On virtually every occasion when the matter was adjourned and then recommenced, the learned regional magistrate enquired from the appellant whether he had changed his mind concerning legal representation and whether he wished to apply for representation to the Legal Aid Board. The learned regional magistrate was fastidious about this. On each occasion the appellant indicated that he understood the position but stated that he wished to continue representing himself. In my view the learned regional magistrate did all that was required of him (see *S v GR* 2015 (2) SACR 79 (SCA)). The appellant could not be forced to accept legal representation where he did not desire it.

With the freedoms provided by the Constitution comes the right to make independent decisions, even foolish decisions.

In addition, the learned regional magistrate was tolerant and patient with the appellant. He assisted the appellant with his case throughout the trial and explained matters to him in terms that he understood where the concepts

and allegations may have been difficult for the appellant to grasp.

Looking at the matter holistically, there was no substantial injustice that occurred despite the appellant having no legal representation (see *S v Moyce* 2013 (1) SACR 131 (WC) at paragraphs 19 and 20).

As regards the second point raised in the heads of argument, counsel for the appellant contended that the court *a quo* was faced with two contradictory versions and was not justified in rejecting the appellant's version because it was improbable or it was not supported. This argument suffers from but a single flaw, but it is a catastrophic flaw. The appellant advanced no alternative version. The appellant chose not to testify and chose to call no witnesses. What alternative version was there before the court *a quo*? The learned regional magistrate clearly informed the appellant that any questions that he put to witnesses did not constitute evidence in his favour. The appellant stated that he understood this. This particular submission betrays a lack of familiarity with the record and is without merit.

As regards the third complaint raised in the heads of argument concerning the charge sheet, the charge sheet stated –

> "Section 51 and / or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable in that:
>
> Victim was raped by accused and an accomplice at knifepoint."

Section 51(1) of the Criminal Law Amendment Act 105 of 1997 provides that –

> "Notwithstanding any other law and subject to subsections (3) and (6) a regional court or a High Court shall sentence a person that has been convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

Part I of Schedule 2 includes rape as contemplated in Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 4007 when committed in circumstances where the victim is raped more than once, whether by the accused or by any co-perpetrator or accomplice.

I would regard the application of the provisions of Part I of Schedule 2 as being self-evident. The State alleged that the appellant and his co-perpetrator each raped her.

That, however, is not the end of the matter. The learned regional court magistrate overlooked the fact that the appellant's co-perpetrator was not before him and could not in the circumstances be convicted of the rape of the complainant. As a consequence, the court *a quo* was not at liberty to conclude that the rape of the complainant fell within the provisions of Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 where the particular part of the schedule relied upon is the rape of the complainant more than once. It follows that the minimum sentence for rape was not applicable to the rape conviction of the appellant and the sentence of life imprisonment must be set aside (see *Mahlase v S* [2011] ZASCA 191 at paragraph 9 and *Ndlovu v S* ZAKZPH 56, a judgment handed down on 12 August 2019 at paragraph 16).

The offence consequently falls into Part III of Schedule 2 of the

Criminal Law Amendment Act 105 of 1997. The minimum sentences applicable to this category of offences are imprisonment for a minimum period of ten years for a first offender and a minimum period of fifteen years for a second offender.

Having concluded that the sentence must be set aside it is not necessary to consider the further criticisms of the sentencing procedure in the court *a quo* as sentence will be considered afresh.

At the sentencing stage the appellant was again represented, ironically by the very attorney he declined to permit represent him at the commencement of the trial. His personal circumstances were advanced by his legal representative and I take cognisance of them. As to the alleged youthfulness of the appellant, there is no evidence by the appellant that his level of maturity or lack thereof should serve to mitigate his sentence. He is an adult and he was mature enough to father a child. There was also no evidence whatsoever that the appellant has displayed any remorse for his actions.

When considering the crime itself it may be possible to imagine a more serious set of facts or a more depraved form of violation but the violation of a woman remains a violation. The act of rape is a gross invasion of a woman's bodily integrity. It was described in *S v Chapman* as –

> "…a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim."

There is a great public clamour at the moment against gender-based violence and such an outcry is justified. The clamant cry is for appropriate

sentences in instances of this nature.

This particular rape occasioned injury to the complainant as previously described in this judgment. The complainant also stated that she felt pain whilst being raped. The attack on the complainant was committed in a base fashion in a public urinal where she was made to lie on the floor in order to be raped. The appellant and his co-perpetrator showed no concern for the complainant's wellbeing. They took most of her clothes with them when they left, presumably in an attempt to hamstring her from emerging from the public toilet to raise the alarm. To do so, the complainant had to use what clothing the appellant and his co-perpetrator had left behind, namely a jacket, to shield her modesty thus causing her further humiliation. That the complainant was traumatised by the experience was evident in her distress while testifying in the court *a quo*.

The period that the appellant spent in custody awaiting trial is a valid consideration that must be taken into account. He was arrested on 18 August 2008. He was asked to plead on 9 December 2009. He was convicted on 4 October 2010 and was sentenced on 10 November 2010. Whilst not a model of swiftness, unfortunately, there is nothing exceptional in the period of time that the appellant was required to spend in custody awaiting finalisation of his matter. Nonetheless that period will be taken into consideration in the sentence to be imposed.

It is so that by the time that the appellant stood trial in the matter under appeal he had already been convicted on a charge of rape and was serving a life sentence for that offence. It was apparently this offence for

which he was convicted and sentenced that provided the link to this case. That offence was committed after the present offence but the appellant was convicted before this offence. It is proper that this, despite it not being a previous conviction, should be taken into consideration during the sentencing process in this matter (see *R v Liebenberg* 1924 TPD 579).

In my view a sentence in excess of the minimum sentence prescribed is called for in this matter. I am of the opinion that a sentence of fifteen years' imprisonment is appropriate and it may be imposed in terms of the provisions of Act 105 of 1997 and should be imposed. I have arrived at this after taking into consideration the time that the appellant spent in custody awaiting finalisation of his trial.

I WOULD ACCORDINGLY ALLOW THE APPEAL TO THE EXTENT THAT THE SENTENCE IS ALTERED FROM ONE OF LIFE IMPRISONMENT TO ONE OF IMPRISONMENT FOR FIFTEEN (15) YEARS WHICH SENTENCE IS TO RUN CONCURRENTLY WITH THE SENTENCE OF LIFE IMPRISONMENT THAT THE APPELLANT IS CURRENTLY SERVING.

KRUGER J I agree and it is so ordered.

TRANSCRIBER'S CERTIFICATE

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TANDASO PETERSON NOMBELE
v
THE STATE

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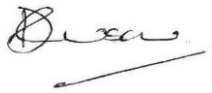

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IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NUMBER	:	AR 36/2019
HEARD AT	:	DURBAN
DATE	:	1 NOVEMBER 2019

TANDASO PETERSON NOMBELE

versus

THE STATE

BEFORE
THE HONOURABLE JUDGE KRUGER
and
THE HONOURABLE ACTING JUDGE MOSSOP

FOR THE APPELLANT	:	MR E M CHILIZA
FOR THE RESPONDENT	:	M NGCOBO
INTERPRETER	:	

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