IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR131/16

In the matter between:

SIPHIWE WISEMAN MTHEMBU **FIRST APPELLANT**

SIBONELO ZUNGU **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

STEYN J

[1] The two appellants were convicted on eight counts and ten counts of rape respectively in the regional court Pinetown and sentenced to life imprisonment. Both the appellants elected to exercise their right in terms of s 309(1)(*a*) of the Criminal Procedure Act 51 of 1977 (the Act) as amended and elected to appeal against their convictions and the sentences imposed by the court *a quo,* despite the fact that they had pleaded guilty to the various counts.

Ad merits

[2] It is necessary for purposes of this appeal to take into account the proceedings at the pre-trial stage as well as the 'trial' stage in order to determine whether there was any kind of misdirection regarding the convictions. Both of the appellants were initially charged with eleven counts of rape (counts 1, 4, 6 to 9 and 11 to 15) to which they pleaded guilty before the court *a quo*. In support of their pleas, they each tendered a s 112(2) statement (exhibits 'A' and 'B' respectively) before the court. Each of the appellants was convicted on all of the counts, after the State confirmed that the admissions made by them were in accordance with the State's case. What makes this appeal unique is that the proceedings at the sentencing stage impacted on the regularity of their convictions.

[3] When the prosecutor addressed the court on sentence, it appeared *ex facie* the record that counts 8 and 13 related to the same complaint and that the State had erred in charging the appellants with two counts of rape rather than one.[1] The confusion regarding the convictions is best illustrated by the transcript of the proceedings. It reads:

> 'COURT I have just noticed that count 13 and count 8 reflect the same person. It would appear as though count 8 and count 13 have been duplicated.
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> PROSECUTOR It appears so, Your Worship.
>
> COURT I note your pleas indicate the respective accused plead guilty to … [intervention]
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> MR MKHIZE It is the same.

[1] At 160 lines 5 to 9 of the record.

> COURT I think where the confusion has come in perhaps is that they're separated by count 8 and then count 13. There is a number between but in count 8 it is mentioned Z P. Count 13 is Z P. But it is the same date, the same age. It appears as though there has been a duplication.
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> PROSECUTOR Yes, Your Worship. That would explain why I did not have count 13 when I did my address.
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> COURT Although the two counts have put the accused, I must admit that at the time the charges were put I never picked up that it was the same name given that 11 counts were read into the record. Okay, it is almost 1 o'clock. Unfortunately, gentlemen, we are going to have to come back at 2 o'clock to do this. During the lunch adjournment, Ms Ndlela, just to confirm the situation, that you don't have another docket, that there is what appears to be a duplication of charges.'[2]

[4] After considering the averments as per the charge sheet, the learned regional magistrate concluded that the two counts constituted a duplication of convictions[3] and opined that the matter should be sent on review. On 26 March 2014 when the case was before the court, the magistrate informed the parties that she had reconsidered her earlier decision to send the matter on review and had instead decided to enter a plea of not guilty on count 13. When the State indicated that no witnesses would be called by it, she deemed the State's case closed and discharged both of the appellants on count 13 *mero moto* in terms of s 174 of the Act.

[5] On the next occasion the first appellant was represented by a different legal representative. In counsel's address on sentence on behalf of the first appellant, he informed the court that the appellant had never intended pleading guilty to counts 14 and 15. It is necessary to deal in more detail with what transpired in court. The magistrate placed the following on record:

> 'The plea of Mr Mthembu in respect of counts 14 and 15 indicates that he had sexual penetration with WM in respect of count 15 and NM by inserting his genital order into the aforementioned and all of the complainants' genital organs without their consent.
>
> This was accepted by the State. I am now told something different. I should add that Mr Mthembu confirmed the content of the statements as well. Therefore it appears to the Court that these admissions have been incorrectly made because it is clear from what I have now been told that he did not insert his genital organ into the genital

[2] At 159 line 23 to page 160 line 1 to 18 of the record.
[3] Seemingly the learned magistrate had s 83 of the Act in mind as well as the common law rule that militates against the duplication of convictions, also referred to earlier as the rule against the 'splitting of charges'.

organs of the complainants in count 15 and 16, albeit that he may be guilty of another offence.

I therefore have to decide what to do with this matter. I am not happy to finalise this matter on the basis of this plea which is obviously not a true reflection of the facts. I am going to do a bit of research on this matter and make a decision as to the best course of action whether it entails referral to the High Court or perhaps enter a plea of not guilty.'[4]

[6] On the next court date, the magistrate decided to enter a plea of not guilty in respect of counts 14 and 15. The following transpired:

'COURT I'd like to ask why he (sic) after the plea was interpreted to him he confirmed the correctness?

MR MKHIZE Your Worship, from the time I was involved in the matter that question was entertained by myself with the accused that if he's denying the guilty pleas why when it was interpreted to him did he confirm, and when the Court questioned the validity of the pleas and the instructions given by him to the attorney he further confirmed when the Court's enquiry was translated or was interpreted in court he confirmed the guilty pleas. I can't really give the Court a satisfactory answer but just when I was involved and I came into the matter he was adamant that he was not pleading guilty on the last two counts.

COURT All right thank you. It would appear to me after the address by the State in respect of counts 14 and 15 that there was a discrepancy between what was in the plea and what the State would allege on counts 14 and 15, hence me remanding the matter for Advocate Mkhize to canvass this with accused 1, I can see no reason why I can't accept his explanation given that the State in fact now, after having initially accepted the guilty plea, now say that that's not their evidence in any event. So I therefore think that the admissions had been made incorrectly and that in terms of Section 113 pleas of not guilty should be entered on counts 14 and 15 in respect of accused 1 and I am doing so.

MR MKHIZE As the Court pleases.

COURT Yes, Ms Ndlela?

PROSECUTOR Your Worship, the State leads no evidence in respect of the counts.

COURT You're not calling anyone?

PROSECUTOR Yes, Your Worship, I haven't consulted with the investigating officer as well.

COURT I'm assuming then you're applying for … [intervention]

MR MKHIZE I'm applying for a discharge in respect of count 14 and 15.

COURT Ms Ndlela, anything to say?

PROSECUTOR No, Your Worship.

[4] At 173 line 19 to 174 line 11 of the record.

> MR MNCWABE … [indistinct]
>
> COURT Well given that the State has chosen not to lead any evidence in respect of counts 14 and 15 in respect of MR MTHEMBU the Court finds him NOT GULTY AND DISCHARGES HIM ON THOSE TWO COUNTS.'[5]

(My emphasis.)

[7] Before I proceed to deal with the submissions made by the parties on sentence, it is necessary to deal with the conduct of the learned regional magistrate as well as the State prosecutrix.

[8] The admissions made in terms of s 112(2) are vitally important in determining the guilt of an accused person. Therefore if any averment is not admitted by an accused a plea of not guilty must be entered in terms of s 113[6] of the Act and the prosecution should proceed in the normal fashion. Despite the fact that that the State accepted the version tendered by the appellants, it elected to place facts before the court that are different to the factual matrix accepted.

[9] The Supreme Court of Appeal in *S v Mbuyisa*[7] held that s 112(2) of the Act requires a written statement in which the accused sets out the facts upon which he or she admits guilt. If the facts do not cover the essential elements of the charge, a

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[5] At 176 line 20 to 178 line 9.

[6] Section 113 reads:

> '113(1) If the court at any stage of the proceedings under section 112 (1) (*a*) or (*b*) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.
>
> (2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.'

[7] 2012 (1) SACR 571 (SCA).

conviction should not follow.[8] In *S v Carter*[9] the court considered the fairness of the process where an accused pleads guilty and held:

> 'Is there any reason why the fair-trial test should require the conviction and sentencing proceedings to be compartmentalised? There may be situations where such a separation is inherent in the notion of a fair trial, eg when the plea is one of not guilty and an element of the offence is proved for the first time during the course of sentencing. There is, however, a difference in principle once an accused pleads guilty. He thereby indicates that he no longer takes issue with the prosecution and does not require proof of it of any of the elements of the offence. Sections 112(1)(*b*) and 112(2) are not concerned with *proof*; there is no question of discharge of an onus. In order to protect an accused the judicial officer must satisfy himself, by questioning the accused if necessary, that the accused in fact admits the elements of the charge and is therefore guilty of the offence. Fairness in the judicial process is a matter of substance, not technicality or procedure (though both may bear on substance).'[10]

(My emphasis.)

[10] Our courts have persistently focussed on the factual matrix as stated in a s 112(2) statement, especially in instances where it is accepted by the State.[11] In *casu* both the magistrate and the prosecutrix overlooked this principle. If the State was not satisfied with the facts admitted, then it should not have accepted the facts contained in the s 112(2) statement of any of the appellants since it is in variance with the facts that the State wanted to present to the court. The State was duty bound to inform the court of its decision, so that a plea of not guilty could have been entered in terms of s 113 of the Act.

[11] It remains the duty of every presiding officer to consider the admissions as per the s 112(2) statement and to question an accused person in terms of s 112(2) if the court is in doubt and needs to clarify an admission.[12] The s 112(2) statements *in*

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[8] *Ibid* para 7.
[9] 2007 (2) SACR 415 (SCA).
[10] *Ibid* para 34.
[11] See *Kekana v S* (629/13) 2014 ZASCA 158 (1 October 2014); *S v Moorcroft* 1994 (1) SACR (T) at 320g and *S v Swarts* 1983 (3) SA 261 (C) at 263C-D.
[12] Section 112(2) of the Act reads:

> 'If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he had pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (*b*), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty:

casu were scant on the facts and as much as they served the essential purpose of demonstrating to the court that the appellants committed the offences in question, the court in my view ought to have clarified the role played by each of the appellants, since the statements lacked such detail. Had the court *a quo* done so, it would have avoided the dilemma as presented by first appellant's counsel where the conduct as alleged in counts 14 and 15 was denied. In fact, the court in its haste to then correct a wrong conviction, completely disregarded the State's right to close its own case. The magistrate also omitted to consider the admissions made and whether it proves a lesser offence. The learned magistrate admitted the earlier oversight at the time when she filed reasons:

> 'I submit that I erred in failing to confirm with the State that, that was the State's case after the prosecutor informed the court "the State leads no evidence in respect of the counts" (page 47). However I submit that no prejudice occurred as the State's intention was clear from those words.'[13]

[12] In *S v Jansen*[14] Davis J held that where an accused pleads guilty to a charge and hands in a statement in terms of s 112(2) of the Act, setting out the facts on which he pleads guilty and the State accepts the plea, the plea accepted constitutes the essential factual matrix on which sentence must be imposed.

[13] The full court of this division in *S v Khumalo*[15] held as follows:

> 'Although the judgment of Davis J provides that the essential factual matrix is set out in the plea accepted by the state, and cannot be altered by evidence subsequently adduced, this does not prevent the leading of evidence which does not contradict the plea, but which may be relevant to the question of sentence. Even if contradictory evidence does emerge, the conviction on the plea as accepted stands.'[16]

(My emphasis.)

> Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.' (My emphasis.)

[13] See record at 187.
[14] 1999 (2) SACR 368 (C).
[15] 2013 (1) SACR 96 (KZP).
[16] Para 11.

[14] I align myself however with the view of the Supreme Court of Appeal in *Kekana v S supra* recently that endorsed *Jansen's* ratio. Mathopa AJA at para 9 held:

> 'In *S v Jansen* it was held that where an accused pleads guilty and hands in a written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (CPA) detailing the facts on which his plea is premised and the prosecution accepts the essential factual matrix and cannot be extended or varied in any manner which adversely impacts on the measure of punishment as regards the offence. The plea defines the lis between the prosecution and the defence. See also *S v Ngubane*. The State contended that the facts set out in the s 112(2) statement showed that the murder was premeditated.'

(Original footnotes omitted.)

[15] In questioning the regularity of the proceedings before the court *a quo* we invited both counsel to submit supplementary heads.

[16] Mr Naidoo, for the respondent, argued that the magistrate committed no irregularity in the alternative, he submitted that any irregularity at the sentencing phase should be regarded as an irregularity that does not vitiate the proceedings. Counsel however, correctly in my view, conceded that the procedure adopted by the learned magistrate in relation to count 13 was not in accordance with justice. She should have taken counts 8 and 13 as one since there was a duplication of convictions. I agree with counsel on this issue. The submission in respect of counts 14 and 15 are however less persuasive.

[17] Counsel appearing on behalf of both appellants failed to file any supplementary heads that dealt with any perceived irregularity before the court *a quo*.

[18] The submission on behalf of the respondent in respect of counts 14 and 15 was that the magistrate was in doubt and obliged to enter a plea of not guilty and to invite the State to lead evidence. I agree that the learned magistrate was obliged to

enter a plea of not guilty and ask the State to proceed with evidence. The record bears testimony thereto whether it happened:

> 'PROSECUTOR There are no State witnesses before Court.
>
> COURT All right. Given the period that this matter has been on the roll, I am of the opinion that to remand it further would be an unreasonable delay in terms of Section 342(a) and therefore, in terms of Section 342(A) (d), which states:
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> > "Where an accused has pleaded to a charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed."
> >
> > Accordingly I am deeming the State case closed. I have no doubt that if I asked the defence you would both be asking for discharge on this count and both accused are found not guilty and discharged on count 13 in terms of Section 174 of the Criminal Procedure Act."'[17]

[19] The record reveals that the State was not given an opportunity to request a further postponement. Section 342A of the Act regulates unreasonable delays and requires that the court shall investigate any delay and consider any substantial prejudice to the prosecution, the accused or his legal adviser. The learned magistrate found that the matter was unreasonably delayed without giving any party an opportunity to address her on any delay caused or any prejudice suffered. It is clear from the record that the learned magistrate overlooked the obligations placed on the court and consequently failed to adhere to them.

[20] In considering any irregularity the ratio of *S v Moodie*[18] and *S v Naidoo*[19] still apply and it is not necessary to repeat what had been said in them. What is required for purposes of this judgment is to determine whether the conduct of the learned magistrate was irregular and to determine whether the conduct resulted in a failure of justice. In my view the conduct of the magistrate when measured against the following statutory provisions, namely ss 112, 113 and 342A of the Act falls short. Her conduct however, although irregular, did not cause any prejudice to any of the appellants. In fact it operated in favour of the appellants. As much as the State was

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[17] See 164 lines 18 to 165 line 10 of the record.
[18] 1961 (4) SA 752 (A).
[19] 1962 (2) SA 625 (A).

deprived of the opportunity to prove counts 14 and 15 against the first appellant the State never complained of any injustice suffered. In the context of a fair trial the irregularities did not impact on any of the two appellants' rights, nor did it result in a failure of justice and accordingly I am satisfied that although there were irregularities during the various phases of the trial, it did not vitiate the proceedings. Accordingly, there is no merit in any appeal against the convictions.

Ad sentence

[21] Counsel appearing on behalf of the appellants *inter alia* submitted that the appellants should not have been sentenced to life imprisonment on counts 7 and 12 since the conduct of the appellants did not fall within the ambit of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. It was also argued that the court *a quo* attached insufficient weight to the traditional mitigating factors when it made the finding that there were no substantial and compelling circumstances to deviate from the prescribed sentence of life.

[22] Mr Naidoo submitted that the charges all attracted the provisions of the Criminal Law Amendment Act and listed the following factors in aggravation of the sentences:

(a) that the appellants were convicted of multiple rapes;

(b) that the rapes were committed over a period of 3 months;

(c) that the appellants lured the complainants into their vehicle under the pretext of giving them a lift;

(d) that the appellants on occasion forced the complainants into the aforesaid vehicle by wielding knives and firearms.

(e) that the ages of the victims ranged from 14 to 26.

The respondent submitted that the appeal against sentence be dismissed.

[23] The submission by counsel for the appellants that the offences were not in terms of Schedule 2 is misplaced. At the onset of the matter, the appellants were informed of the application of the Minimum Sentence Act and why it finds application.[20] The Act provides in terms of Schedule 2 as follows:

> 'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –
>
> (a) when committed –
> (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
> (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;'[21]

(My emphasis.)

[24] Rape is a very serious offence and both appellants have been convicted on multiple counts (the first appellant on eight counts and the second appellant on ten counts). All of the counts attract life imprisonment unless substantial and compelling circumstances exist to depart from the prescribed sentence. The court *a quo* was well informed of all the circumstances of each appellant. In addition it cannot be disputed that the offences were very serious and horrific in nature. Life imprisonment in my view is not only appropriate but proportional to the circumstances under which these crimes are committed. This court concerns itself with the question whether the court *a quo* was misdirected in its conclusion that none of the facts listed qualify as substantial and compelling. I have carefully considered the sentencing judgment and am not persuaded that the court had erred in imposing the sentences it did.

Order

[25] The appeal against the convictions and sentences imposed is dismissed. The convictions and sentences are confirmed.

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[20] See 132 lines 8 to 18 of the record.
[21] Criminal Law Amendment Act No. 105 of 1997 as amended.

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STEYN J

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CHETTY J

Appeal heard on :	18 May 2017
Counsel for the appellants:	Mr SB Madondo
Instructed by :	Durban Justice Centre
Counsel for the respondent :	Mr D Naidoo
Instructed by :	The Director of Public Prosecutions
Judgment handed down on :	30 June 2017