Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO

NORTHERN CAPE HIGH COURT, KIMBERLEY

Saakno: / Case number: **K/S 44/06**
Datum verhoor: / Date heard: **22 / 02 / 2010**
Datum gelewer/Date delivered: **26 / 02 / 2010**

In the application of:

MZUNZIMA PHALA Appellant

and

THE STATE Respondent

Coram: Kgomo, JP *et* Lacock J *et* Mjali, AJ

JUDGMENT ON APPEAL

LACOCK J:

[1] The appellant was convicted in the Court ***a quo*** (Molwantwa AJ – as she then was -) on two counts viz – (a) housebreaking with the intent to rape and (b) rape. On count (a) the appellant was sentenced to undergo imprisonment for a period of 6 (six) years, and on count (b) to 14 (fourteen) years imprisonment. With leave of the

Court ***a quo***, the appellant now appeals against his conviction and sentence.

[2] In regard to the conviction, only one issue arises for decision and that is whether the trial court misdirected itself in convicting the appellant on two counts instead of one count of "housebreaking with the intent to rape and rape". The court found, correctly so in my view, that the appellant broke into the abode of the complainant with the intention of raping her, and whereafter he raped her. This much is conceded by Mr. Cloete on behalf of the appellant. Mr. Cloete however submitted that the trial court committed a misdirection by convicting the appellant on two separate charges since, so he argued, the two counts constituted a duplication of charges. In support of this argument reliance was placed on the judgments in **S v Wehr**, 1998(1) SACR 99(C), **S v Grobler and Another**, 1966(1) SA 507 (A), and **S v Whitehead and Others**, 2008(1) SACR 431 (SCA). The soundness of the principles laid down in these cases in respect of a duplication of charges, cannot be doubted. The question is whether same are applicable to the facts of this case.

Mr. Olivier on behalf of the State submitted that the two counts each represent different offences, and that the trial court correctly convicted the appellant on each count.

In her judgment on the application for leave to appeal, the trial judge said the following in this regard:

"*I have now realised that I committed a misdirection in convicting the accused on both counts, in the light of my finding that the complainant was not repeatedly raped. The duplication of convictions (and sentences) calls for correction and re-sentencing by a Court of Appeal.*"

[3] In the South African criminal jurisprudence, the crimes of "housebreaking with the intent to rape" and "rape" had for centuries been regarded as two distinct offences. In **S v S**, 1981(3) SA 377 (AD), the trial court convicted the appellant ***inter alia*** of housebreaking with the intent to rape and rape, and imposed upon him the death sentence. On appeal Rumpff, CJ found:

"*Tegnies gesien, is, in hierdie besondere geval, die inbraak en verkragting net so nou verbind met mekaar as die misdaad van huisbraak met die opset om te steel en diefstal, wat in die praktyk in ons reg as een misdaad aangekla en gestraf kan word. Nietemin is daar 'n verskil tussen die doodstraf en enige ander straf. Die verskil lê nie net in die absolute finaliteit van die doodstraf nie maar ook in die hele proses wat tot die finale teregstelling lê. Die doodvonnis moet in 'n bepaalde geval, en kan in sekere ander gevalle, opgelê word, kyk art 277 van die Strafproseswet 51 van 1977. Wanneer 'n beskuldigde skuldig pleit aan 'n misdaad wat die doodvonnis regverdig en die pleit word aanvaar, kan die doodvonnis nie opgelê word nie tensy die skuld van die beskuldigde bewys is asof hy onskuldig gepleit het, kyk art 112 van die Strafproseswet. Die probleme genoem in die Young-saak supra blyk nog duideliker wanneer die doodstraf opgelê word weens 'n*

misdaad wat wel die doodvonnis regverdig, tesame met 'n misdaad waarvoor die doodvonnis nie opgelê kan word nie. Ten slotte is daar nog die bepalings van arts 325 van 326 van die Strafproseswet wat lui:-

'325. Geen bepaling van hierdie Wet raak die bevoegdheid van die Staatspresident om iemand te begenadig nie.

326(1) Die Staatspresident kan in 'n geval waarin hy iemand begenadig wat ter dood veroordeel is, sonder toestemming van so iemand die doodvonnis versag na 'n ander straf wat regtens opgelê kan word.

(2) So 'n strafversagting word skriftelik aan die Minister meegedeel, wat daarop beveel dat die betrokke persoon gestraf word op die wyse deur die Staatspresident gelas, en so 'n bevel het die uitwerking van 'n geldige vonnis wat opgelê is deur die Hof deur wie bedoelde persoon skuldig bevind is.'

'n Mens kan jou voorstel watter probleme kan ontstaan onder hierdie artikel, wanneer een doodvonnis opgelê is ten opsigte van meerdere misdade, miskien ernstige misdade. Na my mening is dit dus onvanpas om, soos in die onderhawige geval gebeur het, die doodvonnis op te lê weens verkragting en weens huisbraak met die opset om te verkrag (sonder verswarende omstandighede). Dit volg nie dat die vonnis nietig is nie vir sover dit die skuldigbevinding aan verkragting betref. Daardie vonnis kan bly staan terwyl die vonnis ten opsigte van die genoemde huisbraak afsonderlik oorweeg kan word.Ten opsigte van die klag van verkragting is die vonnis nie nietig nie en dit volg ook dat dit hierdie Hof nie vrystaan om, op die skuldigbevinding van verkragting, sy eie vonnis op te lê nie." (at 380 H to 381 F) and concluded,

Die appèl word afgewys in verband met die doodvonnis teen die skuldigbevinding aan verkragting. Die appèl slaag in verband met die skuldigbevinding aan huisbraak met die opset om te verkrag. Die bevel van die Verhoorhof ten opsigte van hierdie twee skuldigbevindings word verander om soos volg te lees: "Weens die skuldigbevinding aan verkragting word die doodvonnis opgelê" en "weens die skuldigbevinding aan huisbraak met die opset om te verkrag (sonder verswarende omstandighede) word 'n vonnis van drie jaar gevangenisstraf opgelê." (at 382 B to C).

In **S v Zamisa**, 1990 (1) SACR 22(N) the accused was convicted of "housebreaking with intent to rape and attempted rape" in a regional court. On appeal Thirion, J held,

"*The question at issue in this appeal is whether on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, it would be competent to convict the accused not only of housebreaking with intent to commit a specific offence but also of the specific offence itself. It is settled practice to charge as one count the crime of housebreaking with intent to commit a crime and the crime itself, which was committed in consequence of the breaking in and for the purpose of the commission of which the breaking in was committed. So much so is this the practice that only one sentence is imposed in respect of a conviction of housebreaking with intent to commit a crime and the further crime, to commit which the breaking was effected. That circumstance, however, does not do away with the he fact that housebreaking with the intent to commit a crime is in itself a distinct crime which is separate from, and not dependent upon, the crime committed after entry has been effected.*" (at 23 c to e).

(My emphasis added)

Compare **S v Cetwayo**, 2002(2) SACR 319 (E):-

"*It is trite that housebreaking with intent to commit an offence is in itself a substantive offence (see s 262 of Act 51 of 1977) and that it is a separate offence from the actual offence, for the purpose of which the housebreaking was committed, if such be committed. The practice is, however, that, if the offences relate to what is in effect a single incident, they are, unless there is good reason to the contrary, charged as a single offence and a single punishment is imposed.*"

[4] In the present matter, the appellant was charged with (a) housebreaking with the intent to commit an offence

unknown to the prosecutor and (b) rape. On the first count he was convicted of "housebreaking with the intent to rape" (see section 262(2) of the Criminal Procedure Act, 51 of 1977) and on the second count of "rape".

To my mind the trial judge was entitled to convict the appellant on the two distinct counts and no misdirection had been committed in this respect. The appellant committed two offences, each of which comprising its own elements. See **Snyman, "Criminal Law" (Fourth Edition)**, p. 445 ("Rape") and 539 ("Housebreaking with intent to commit a crime"). The principles laid down in **Wehr, Grobler and Whitehead (supra)** in regard to a splitting or duplication of charges, have no application to the facts in this matter.

[5] I am furthermore convinced that the appellant was not only properly charged with two separate offences, but also that he had been properly convicted on the two separate counts.

5.1 In terms of Section 51(2)(b) of the Act 105 of 1977, (The Act), read with Part III of the second schedule to the Act, a conviction on a charge of rape (now an offence under Section 3 of Act 32 of 2007) attracts a minimum sentence of – in the case of a first offender – 10 years imprisonment (and a life sentence if the

offence was committed under the circumstances provided for in Section 51(1) of the Act read with Part I of the second schedule thereto). Not any one of the offences listed in schedule 2 of the aforesaid Act includes an offence of "housebreaking with the intent to (commit a listed offence) and (the listed offence). Since the consideration of compelling and substantial circumstances only arises in respect of listed offences (section 51(3) of the Act), I am of the view that it is undesirable to regard the offence of housebreaking with intent to commit a listed offence and the (listed) offence itself as one offence for purposes of sentence. To my mind, it was not the intention of the Legislature to allow an accused to escape punishment in respect of the housebreaking offence in circumstances where, immediately after the break-in, a listed offence had been committed. In this regard I respectfully disagree with Jordaan AJ in **S v Makau**, 2000 (1) SACR 596 (TPA) where he held,

"*Die vraag is of die misdaad van huisbraak met opset om te roof en roof by noodwendige implikasie ingelees moet word in Skedule 2 tot die Wet. Ek meen wel so. Waar bewys is dat die hoofopset is om te roof is die huisbraak bloot insidenteel tot die bereiking van die uiteindelike doel.*" (at 602 c).

To regard the housebreaking offence simply as incidental to the achieving of the "main" object, is an oversimplification of the real mischief of housebreaking i.e. the invasion of the constitutional right to privacy of the victim.

5.2 There is a further and perhaps more substantial reason why the two said offences should not be regarded as a single offence for purposes of sentence. If on appeal it is found that the State failed to prove the offence of rape (or any other listed offence) which attracted a minimum prescribed sentence, it would put the court of appeal in the invidious position to consider a sentence for the housebreaking offence without the trial court having considered a sentence at all in respect of that offence. Different principles apply to unlisted offences such as theft and listed offences such as rape or murder when sentence is considered. When a court enjoys a wider and unfettered discretion in regard to sentence, it may be convenient to regard, for instance, the crime of housebreaking with the intent to steal and theft, as one offence for purposes of sentence. However, when a court's sentencing discretion is statutorily impeded in respect of one offence and unimpeded in respect of the other, it should be regarded as undesirable for a court

to construe the two offences as one for purposes of sentencing an offender. See **S v S (supra)**, and compare **S v Tshomi en 'n Ander**, 1983(3) SA 662 (AD) at 665 G:-

"*Waar net één straf ten opsigte van twee misdade deur 'n Verhoorhof opgelê word, kan probleme ontstaan indien op appèl beslis sou word dat die appèl teen een van die skuldigbevindings slaag, of dat die appellant aan 'n minder ernstige misdaad (of misdade) as dié waarvan hy skuldig bevind is, en waarvoor die opgelegde straf onvanpas sou wees, skuldig bevind moes gewees het.*"

[6] In summary: the trial judge did not commit a misdirection when she convicted the appellant on the said two counts of (a) housebreaking with intent to rape, and (b) rape. It is not necessary for purposes of this judgment to decide whether, had the judge convicted the appellant of one offence of "housebreaking with the intent to rape and rape", she would have committed a misdirection.

[7] The Court ***a quo*** however committed a misdirection by failing to consider the minimum sentence prescribed in Section 51(2)(b) of the Act read with Part III of Schedule 2 thereof in respect of the conviction on the rape charge, and the presence or absence of compelling and substantial circumstances as required by the provisions of Section 51(3) of the Act.

7.1 Counsel for both parties are ***ad idem*** that, since all relevant evidence and circumstances having a bearing on sentence are recorded, this Court is in as good a position to consider sentence afresh as the trial court had been. I am in agreement with these submissions, and therefor find it unnecessary to refer the matter back to the trial court.

[8] The personal circumstances of the appellant had been summarised as follows by the trial judge:-

> "*The accused's personal cirumstances as put before me, apart from your age, are the following: that he is single and has one child who is staying with its biological mother; he is the eldest of a family of three; he has gone up to level 4 which is the equivalent of standard 8, 9, 10 at school and therefore is fairly educated; he is unemployed but was doing the so-called "piece jobs" every Saturday earning R240,00 per day and he used the monies to maintain the child that he has; the accused is not a first offender, he has two previous convictions of housebreaking with intent to steal and theft committed in 1990 and 2000 respectively.*"

He was 30 years old at the time of committing the relevant offences.

[9] The crime of rape is no doubt a very serious one. What aggravates the present offence is that the appellant broke into the house of the complainant with the intention of raping her. He clearly had no regard for her privacy in her

own home and where she was supposed to be safe. He furthermore threatened her with a knife, and even injured her with this knife when she tried to defend herself. The physician who examined the complainant described the injuries to her private parts as indicative of "sexual violence".

[10] The appellant has shown no remorse for what he did to the complainant. In fact, he persisted throughout in his defence that he had had a sexual relationship with the complainant and that she consented to intercourse. The trial judge had – correctly so in my view – this to say in regard hereto:

"*He has no remorse but feels and believes that he did not commit these offences. He has not once asked the complainant's forgiveness. Instead he purportedly wrote a letter whilst in custody because she is his "secret wife" as he puts it, to convince her to talk this over. In my view to convince her to withdraw the case as he could see that he was in trouble. This is an indication of non-repentance. It says to any reasonable person that given another chance the accusd would do this without hesitation.*"

[11] In considering the interest of society and that of the victim, I can do no better than the trial judge, and I quote:-

"*Rapists are the most feared of criminals in any country. Society expects from the courts to protect it by imposing sentences which will indicate that they are serious about the protection of human rights as already argued by the state. Protection of human rights, that includes the right to privacy, the right to dignity and the right to integrity.*

The victim was put through a humiliating and a degrading experience by a young man who is supposed to protect her against attacks of this nature. Numerous judges have remarked in similar cases that the rapist does not only murder the victim, he murders her self-respect and destroys her feeling of physical and mental integrity and security. Society expects courts to impose sentences which would deter the accused and other potential rapists not to dare invade these rights. Society expects the courts to uphold law and order because if courts do no do so, it will take the law into its own hands and anarchy will reign and that cannot be swallowed.

The interests of the victim are a critical factor to be taken into account in reaching an appropriate sentence. Her physical injuries and the psychological effects of the incident of this nature on her, are of vital importance and as part of the larger society, the victim is entitled to enjoy the rights alluded to in the above paragraph. She has the legitimate claim to go about in the street and enjoy the peace and tranquility of her home as any other citizen. None of this should have happened to her for the simple reason that she was inside her lock-up home when the accused raped her."

[12] Having considered all the evidence and aforesaid circumstances, I can find no compelling and substantial circumstances justifying a lesser sentence than that prescribed in Part III of Schedule 2 to the Act, i.e. 10 years imprisonment. I do not think that an injustice will be done to the appellant should the minimum prescribed sentence be imposed.

On the other hand, I do not think that a sentence exceeding the aforesaid minimum sentence is justified.

[13] Having regard to the offence of housebreaking with the intent to rape, I can find no reason to interfere with the

sentence imposed by the trial judge. The sentence may be severe, but, in the absence of any misdirection, and since it cannot be regarded as shockingly inappropriate, there is no justification for interference.

[14] By reason of the aforesaid, I would make the following order:-

1. THE APPEAL AGAINST THE CONVICTIONS IS DISMISSED.

2. THE APPEAL AGAINST THE SENTENCE ON COUNT 1 (HOUSEBREAKING) IS DISMISSED.

3. THE APPEAL AGAINST THE SENTENCE ON COUNT 2 (RAPE) IS UPHELD. THE SENTENCE ON THIS COUNT IS SET ASIDE AND SUBSTITUTED WITH THE FOLLOWING:

"10 (TEN) YEARS IMPRISONMENT"

3.1 THIS SENTENCE IS ANTI-DATED TO 19 SEPTEMBER 2006.

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HJ Lacock
JUDGE

I agree, and it is so ordered.

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F. Diale Kgomo

JUDGE-PRESIDENT

I agree.

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Mjali, AJ
JUDGE

On behalf of Applicant:	**Adv P.J. Cloete o.i.o. Kimberley Justice Centre**
On behalf of Respondent:	**Adv P. Olivier o.i.o Director of Public Prosecutions**