IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 247/13

Reportable

In the matter between:

MASHAVA MICHAEL MAGEZI **Appellant**

and

THE STATE **Respondent**

Neutral Citation: *Magezi v S* (247/13) [2013] ZASCA 200 (02 December 2013).

Coram: NAVSA ADP, MAYA and SALDULKER JJA

Heard: 26 November 2013

Delivered: 02 December 2013

Summary: **Rape – Sentence – Section 39(2)(*a*)(i) of the Correctional Services Act 111 of 1998 – Where an accused is convicted of two or more offences and has been sentenced to punishment consisting of life imprisonment and other determinate sentences, such sentences or sentence of imprisonment are subsumed under the life sentence – They run concurrently with the sentence of life imprisonment.**

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Makgoba AJ sitting as court of first instance).

The following order is made:

1. The appeal against the sentence succeeds to the following extent:

2. The order of the court below is set aside and substituted with the following order:

‘(a) On count one, the count of rape, the accused is sentenced to life imprisonment.

(b) On count two, the count of attempted murder, the accused is sentenced to 10 years’ imprisonment.

The sentence on count two is to run concurrently with the life sentence on count one.’

JUDGMENT

SALDULKER JA (NAVSA ADP et MAYA JA CONCURRING):

[1] This is an appeal directed against sentence only. It is before us with the leave of the court below. On 3 September 2003 the appellant, Mr Michael Magezi Mashava (Mashava) and a co-accused were convicted in the Limpopo High Court, Thohoyandou, by Makgoba AJ on one count of rape and one count of attempted murder. Each was sentenced to life imprisonment for rape and a sentence of ten years’ imprisonment was imposed in respect of the attempted murder conviction. The sentences were ordered not to run concurrently.

[2] In argument, counsel for the State restricted his submissions to whether the sentences imposed on the appellant should have been ordered to run concurrently. He rightly in my view did not challenge the finding of the court below that there were no substantial and compelling factors on count one, the rape count that 'justified' a lesser sentence. The complainant suffered a most horrendous ordeal. The facts in the paragraph that follows amply demonstrate this.

[3] The complainant, a 27-year old woman, was set upon by the appellant, his co-accused and the father of her child (who passed away in the time between the incident and the trial), at 06h00 whilst on her way to her place of employment. She was bundled into a car, assaulted therein and transported to a deserted place on a mountain where her feet were tied and she was raped by the appellant and his friends. After she was raped, she was stabbed twice by the father of her child, struck on her face with a rock by the appellant's co-accused and struck by the appellant on her head repeatedly with a firearm. She was also kicked. She was made to lie face down whilst her attackers walked on her back. The complainant lost consciousness and was abandoned by her attackers alongside a mountain. She regained consciousness a day later and crawled to a school where she sought assistance. The police encountered her at the school, wounded and bloody. As a result of her injuries, the complainant spent four weeks in hospital recovering from the injuries. It is clear that she was the victim of a savage attack that had no regard for her as a human being.

[4] In convicting the appellant and his co-accused on the charge of attempted murder, the court below reasoned that, because of the nature and severity of the assaults they must have intended to kill her because she knew them and could identify them. The court below took the view that they had left her for dead.

[5] In sentencing the appellant and his co-accused Makgoba AJ in the court below described the rape as 'horrifying'. He took into account that, for this type of rape where

there is more than one perpetrator, the minimum sentencing regime in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997[1] prescribed life imprisonment. The court below could find no substantial and compelling circumstances to deviate from that sentence. Additionally, it could not see its way clear to making an order in terms of which the sentence of ten years' imprisonment would run concurrently.[2]

[6] Section 39(2) of the Correctional Services Act 111 of 1998 stipulates that:

'**Commencement, computation and termination of sentences**

. . .

(2)*(a)* Subject to the provisions of paragraph *(b)*, a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but–

(i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal; . . .' (My emphasis.)

[7] The provision is clear. Any determinate sentence of incarceration imposed in addition to life imprisonment is subsumed by the latter. This is logical and practical. A person only has one life and a sentence of life imprisonment is the ultimate penal provision. Section 39(2)(*a*)(ii) provides for more than one life sentence imposed on a person also to run concurrently. The effect of s 39(2)(*a*)(i) is that the order by the court below that the sentences are not ordered to run concurrently, is liable to be set aside.

[1]Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) stipulates that: 'Notwithstanding any other law . . . a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life. Part 1 of Schedule 2 of the Act includes rape when committed 'in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice' as an offence which attracts the minimum sentence of life imprisonment.

[2] It is necessary to note that although the complainant was subjected to this ordeal and the appellant was convicted on two separate charges they all arose from one on-going event.

[8] Consequently, the directive by the court below that the sentences imposed on the appellant are not to run concurrently stands in clear violation of the aforegoing statutory provisions. There is really no need to order such sentences to run concurrently, they do so by operation of law, and stating it in an order might well be superfluous. In the present case the substituted order that appears in the next paragraph contains such an order for the sake of clarity.

[9] In the premises the following order is issued:

1. The appeal against the sentence succeeds to the following extent:

2. The order of the court below is set aside and substituted with the following order:

‘(a) On count one, the count of rape, the accused is sentenced to life imprisonment.

(b) On count two, the count of attempted murder, the accused is sentenced to 10 years’ imprisonment.
The sentence on count two is to run concurrently with the life sentence on count one.’

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HK SALDULKER

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANTS:	Mr M Madima
	Instructed by:
	Thohoyandou Justice Centre, Thohoyandou
FOR RESPONDENTS:	Mr Nekhambele
	Instructed by
	Deputy Director of Public Prosecutions, Thohoyandou