IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION,

PIETERMARITZBURG

HIGH COURT CASE NO: AR324/12

In the matter of:

MAKETHE ABRAHAM NKWANYANE **APPELLANT**

vs

THE STATE **RESPONDENT**

JUDGMENT

Heard on: 09 October 2014
Delivered on: 30 October 2014

Ntshangase J et D. Pillay J

[1] The appellant appeals against his conviction and sentence for robbing the complainant of her Nokia 6200 cellular phone and for raping her approximately nine times. He was sentenced to 15 years imprisonment on each count with both counts running concurrently. The court gave notice to the parties that it wanted to be

addressed on increasing the sentence. The matter was adjourned twice previously for this purpose.

[2] The state's case was that on 26 January 2009 the complainant, an educator, forty years of age, was on her way to visit her boyfriend in Mthihlwe, in Pongola, northern KwaZulu-Natal. There was no public transport from Makhathini to Mthihlwe. It was about 17h30 when she alighted at Skelm Gate. She started hitchhiking in the direction of Mthihlwe.

[3] A vehicle stopped some distance from her. The appellant, a passenger in that vehicle alighted. He caught up with her. He grabbed her neck, pointed a gun at her and pushed her into the sugar cane plantation. She fell on her back. Initially he raped the complainant four times over about thirty minutes. They walked through the sugar plantation. He tried to rape her again but found he could not get an erection. He managed to penetrate her for the fifth time but did not ejaculate. He raped her three more times in the cane fields.

[4] He carried a small firearm. When she tried to move he threatened to kill her, to split her brains with the firearm, to tie her to a big rock and throw her in the Sawotini Lake. He boasted that he killed the prostitutes that he raped. When she tried to look at him he instructed her to close her eyes. He threatened to kill her if she reported him to the police.

[5] When they reached the road her cellular phone rang. The appellant had taken it from her earlier because it was making a noise. He answered it. After enquiring who the caller was the appellant terminated the call. At this point the trial that started on 22 January 2010 had to be adjourned. The complainant resumed her testimony four months later on 21 May 2010. Notwithstanding the passage of time she resumed the thread of her evidence easily. She asked him to return her cellular phone. Again he responded by threatening to split her brains with his firearm.

[6] She did not know her way. He said he would accompany her. A car drew up. The driver offered the appellant a lift. The appellant declined the lift saying that he was going to Mahehwu, which was nearby. The complainant was too afraid to alert the driver of

her ordeal. She feared that the appellant would shoot her. Before reaching her boyfriend's house the appellant penetrated her for the ninth time. Without going into the gory details of the abuse he perpetrated upon the complainant, I simply note that altogether the ordeal lasted for about three hours.

[7] On arriving at her boyfriend's home at about 22h30 she reported her ordeal to him. They approached the Nduna who tried to trace the car that offered to give them a lift. The police took her to the station. After taking a statement from her the police took her to the hospital. By this time it was about 3h00 or 4h00 on the morning of 27 January 2009. She returned that afternoon to the school where she taught.

[8] A teacher at her school informed her that someone had called her on her cellular phone from the complainant's cellular phone. The caller contacted the teacher again and the complainant spoke to her. The caller identified herself as Ms Gumede who said she was married to the appellant. She informed the complainant that she had found the cellular phone amongst the appellant's clothing. She offered to return it to the appellant. The complainant said that she would revert after speaking to the police.

[9] She reported the phone call from Ms Gumede to the police but the police informed her that it was too late in the day to accompany her to collect the phone. The complainant then contacted Ms Gumede and asked her to leave the phone with the police. The complainant subsequently received a call from the police to collect her cellular phone which she did. She identified it as her cellular phone from the pin code and the photographs that she found on it.

[10] Her boyfriend with the help of the Nduna tracked the vehicle that had stopped to give the appellant a lift. It belonged to Velaphi Gumede a councillor in the local authority.

[11] The police informed her that they did not arrest the appellant because they could not find him. Ms Gumede contacted the complainant again to request her to go to the police station to drop the charges. In turn she offered to pay the complainant four cattle. The complainant said that she would revert after discussing the matter with her boyfriend. Then the appellant called her to remind her of his threat that he would kill her

if she reported him to the police. He too urged her to drop the charges otherwise he would kill her. The appellant called her several times. He informed her that he had spoken to someone at Ubombo police station to have the charges withdrawn. Eventually he sent his wife to the complainant to offer her money to have the charges withdrawn. Accompanied by Ms Gumede she then went to the police station to have the charges withdrawn. The police questioned her as to why she wanted to have the charges withdrawn. She explained that she did not feel safe as the appellant had not been arrested.

[12] It is not clear whether the charges were in fact withdrawn at the time. However, the appellant continued to telephone the complainant. This time he proposed love to her. He invited her to Johannesburg. She accepted. He deposited R400 into her account for transport. He gave her directions only when he was convinced that she was coming to visit him.

[13] The complainant gave the police the directions to the appellant's residence in Johannesburg. Again she checked with the police whether they had arrested him. They told her that they could not find the appellant. When the appellant called her thereafter she convinced him that she was indeed in love with him. They made fresh plans for her to visit him in Johannesburg. Again she informed the police of her plans. The police responded that they could not accompany her to Johannesburg.

[14] In Johannesburg, shortly before she was due to meet the appellant she telephoned the police again and informed them that she was waiting for the appellant. Still the police said that they could not assist her. She asked the police to arrange for the Johannesburg officers to arrest him. That request too fell on deaf ears. The appellant arrived. Left with no choice she accompanied him and his friends to his residence. She had to stay the night and have sexual intercourse with him. She did not want to have sexual intercourse but was compelled by circumstance to submit to him. To her this was rape. She had informed the police of it when she gave them his address. She left him the following morning. Back home she went to the police station to inform the police of his exact location. The police promised to arrest him but again failed to do so.

[15] In the meantime she continued to assure him that she was in love with him until she attended employee assistance programme (EAP). A member of the EAP contacted the head of the police who in turn contacted the police station in Jozini. Accompanied by the school principle she proceeded to Jozini police station to speak to the station commander. He reported again that the police were still attending to the matter. Following the intervention by the EAP and the principal the complainant accompanied the police to Johannesburg to point the appellant out. Together with the help of the police from Johannesburg the appellant was arrested at his place of employment.

[16] Cross-examination of the complainant began offensively with an irrelevant question about whether she enjoyed intercourse with the appellant. Then the cross-examiner seemed to challenge her identification of the appellant. This conflicted with the appellant's version, which emerged for the first time only when he testified.

[17] The defence version was that he met the complainant in 2008. She had become his girlfriend. Notwithstanding the prosecution she was still his girlfriend. She had telephonically arranged to meet him that afternoon. His explanation for her prosecuting him was that she had told him that the person she was visiting was her uncle and not her boyfriend. He was not aware of her love affair with Mr N Gumede until he heard of it in court. She did not want Mr N Gumede to see her in the company of the appellant. The third state witness, i.e. the councillor Mr V S Gumede whom the appellant regarded as a brother to Mr N Gumede might have reported to the latter that he had seen them together on the road that night. This version was never put to the state witnesses.

[18] The appellant denied having intercourse with her at all that night of 26 January 2009. He denied owning a firearm. He denied answering her phone on the night that he raped her. However, the complainant's boyfriend corroborated her version that he called her on her cellular phone several times until a male answered. When he asked to speak to the complainant the male terminated the call. The appellant denied that her clothing was soiled. Not only did he deny any knowledge of how the complainant recovered the cellular phone he also failed to call his wife to refute allegations about her role on returning the cellular phone and accompanying the complainant to the police station to withdraw the charges against the appellant.

[19] The complainant had found a clinic card in the name of Bhekithemba Nwanyane which had fallen from the appellant when he was raping her. Initially when the appellant testified he denied knowledge of the card but later admitted that he used it to collect his brother's medication.

[20] Against his uncorroborated version the state's case was supported by the complainant, her boyfriend and the councillor and the undisputed fact that she recovered her cellular phone from the police after the appellant's wife had left it there. Corroboration also emerges from the J88 even though it was inadequately completed. However, the appellant did not dispute its contents. It records that the complainant had a small bruise on the top of her right buttock and another on her left hip. There were no lacerations or vaginal tears. The doctor concluded that clinically there was no evidence of sexual assault but that it could not be excluded. That conclusion is hardly surprising in the case of a mature sexually active woman.

[21] Drawing on the authority of *The President* of the *Republic* of *South Africa* v *The South African Rugby Union* 2000 (1) SA 1 (CC) paras 61 – 62 to illustrate the vital importance of cross-examination counsel for the state pointed to several material pieces in the complainant's evidence that the appellant failed to challenge. He did not put to her the following:

a. They had been lovers before 26 January 2009.
b. They did not have sex that day.
c. He did not have a firearm.
c. He did not rob her of her cellular phone.
d. He threatened to kill her.
e. Her clothing was not soiled.
f. She was not in shock.
h. She falsely implicated him for the reasons he attested to.

[22] As for his defence, if he had been her boyfriend the complainant would hardly have arranged to meet him when she was on the way to meet Mr N Gumede, her boyfriend. That the appellant falsely implicated him because she was afraid that Mr V.S

Gumede might have informed Mr N Gumede that he had seen them together on the road was his speculation in desperation. The complainant did not know Mr V.S Gumede or the fact that he would know Mr N Gumede. Consequently if she had been having an affair with the appellant she had no reason to think that Mr V.S Gumede would report her. Furthermore, it was he who answered her cellular phone when Mr N Gumede tried to call. He did not explain why he answered the call or indeed why he cut the call without allowing the complainant to speak to the caller.

[23] The conviction on both counts stand.

[24] Turning to the sentences, the learned magistrate imposed 15 years imprisonment for each count, but both to run concurrently. Part 2 of Schedule 2 read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years for robbery with aggravating circumstances. Part 1 read with s 51(1) prescribes life imprisonment for more than one rape of an adult. In alerting the appellant to the minimum sentences the trial court mentioned only the minimum sentences prescribed for robbery and not the life sentence for the rapes. He did not inform the appellant that the minimum sentences of 15, 20 and 25 years applied to robbery only. The learned magistrate erred in advising him that the sentence would be fifteen (15) years for a first time offender. It appears that he laboured under the impression that 15 years was prescribed for both offences. He also clarified that these were minimum sentences unless there were substantial and compelling circumstances. He found no substantial and compelling circumstances to justify lesser sentences. He did not inform the appellant that if convicted he could be sentenced to life imprisonment. Did this prejudice the appellant?

[25] The Supreme Court of Appeal (SCA) has settled the question of notice of the minimum sentence decisively in at least four cases. In *S* v *Kolea* 2013 (1) SACP 409 (SCA) three assailants raped the victim. The charge sheet referred to s 51(2) instead of s 51 (1). The court applied its judgments in *S* v *Legoa* 2003 (1) SACR 13 (SCA); [2002] All SA 373 and *S v Seleke en Andere* 1976 (1) SA 675 (T) to hold: a charge sheet

should set out sufficient detail to enable an accused to answer to it.[1] The matter was one of substance not form. The court refused to lay down a general rule that charge sheets must in every case recite the specific form of the scheduled offence or the facts the state intended to prove to invoke a particular provision of the act.[2] Although it was desirable for a charge to contain a reference to a penalty, this was not essential.[3] The ultimate test was whether the accused had a fair trial, was sufficiently apprised of the charge he was facing and of any likely hood of his being subjected to an enhanced punishment in terms of the applicable legislation. Furthermore, a prescribed minimum sentence means simply that any sentence in excess of the prescribed minimum can still be imposed.[4] It does not create new offences. Rape is still rape; robbery is still robbery. The number of rapes and other aggravating circumstances give the courts discretion to impose higher minimum sentences. In *Kolea* the appellant appealed against his sentence of 15 years imprisonment. The court dismissed his appeal and upheld the state's cross-appeal to impose life imprisonment.

[26] In *Kolea* five members of the SCA overturned the three-bench decision in *S* v *Mashinini* 2012 (1) SACR 604 SA delivered a year earlier saying that the majority had misread the provisions of the s 51 (2); a minimum of 10 years imprisonment implied that a higher sentence including life imprisonment could be imposed.[5]

[27] In *Mashinini* the SCA reduced sentences of life imprisonment to 10 years. The *Kolea* court observed that in *Mashinini* even though the charge sheet incorrectly cited s 51 (2) of the Act the appellants were correctly apprised of the applicability of increased penalties. They pleaded to the charge. They never complained or showed that they suffered any prejudice. They participated fully in the trial. They were not in any way

[1] *Kolea* para 8
[2] *Kolea* para 8
[3] *Kolea* para 9
[4] *Kolea* para 17
[5] *Kolea* para 17

prejudiced by the erroneous reference to s 51(2) instead of s 51(1) in the charge sheet.[6] Accordingly, *Mashinini* was wrongly decided.

[28] In the recent decision of *Ndlovu* v *S* [2014] ZASCA 149 the appellant contended that he was not aware that he faced the prospect of life imprisonment. The court found that the appellant had failed to establish a factual foundation that his right to a fair trial was prejudiced by an error in the charge sheet. Fairness, the court pointed out, applies to both the accused and the public as represented by the state. In that case, as in this, the appellant was legally represented during the trial. In short, the fact that the charge sheet does not cite the correct section in the schedule to the Criminal Law Amendment Act or that a court is mistaken about what the minimum sentence is, is no bar to imposing a higher sentence if the proven charges justify it.

[29] In this case the appellant pleaded not guilty. Having regard to his defence neither his plea nor his explanation would have changed if he knew that a higher sentence might be imposed. The appellant was aware that he faced high minimum sentences unless he showed substantial and compelling circumstances. He hedged his bets on escaping conviction altogether by pleading not guilty instead of relying on substantial and compelling circumstances to avoid a heavy sentence.

[30] Regarding the sentence in count 2 for robbery stealing the cellular phone was not the primary aim of the appellant. Furthermore, his wife returned the phone to the complainant. The sentence on this count should be reduced.

[31] This case is as much an indictment against the appellant as it is against the South African Police Services for remaining unresponsive to the complainant's numerous efforts to assist them to arrest the appellant. It is a double travesty of justice that she had to submit to her rapist again in order to have him arrested. Between the police inaction and the appellant's threat the complainant had little choice but to do what she had to for her peace of mind and personal security. Notwithstanding her courage, resilience and tenacity to see justice done she would have failed but for the EAP and the principal. If it requires powerful people to persuade the police to arrest rapists then

[6] *Kolea* para 19

many rape victims will not see justice done. This is a proper case for investigation of the conduct of the police in terms of the Independent Police Investigative Directorate Act No.1 of 2011, its predecessor and other relevant prescripts.

[32] I accordingly propose that

a. the conviction be upheld.

b. the sentence of fifteen (15) years imprisonment on count 1 for rape be increased to life imprisonment.

c. the sentence of fifteen (15) years imprisonment on count 2 for robbery of the cellular phone is reduced to ten (10) years imprisonment.

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D. Pillay J

I agree

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Ntshangase J

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