IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Reportable

CASE NO: AR669/13

In the matter between:

ERNEST JOHN HARGREAVES Appellant

And

THE STATE Respondent

JUDGMENT

Delivered on 12 February 2015

NDLOVU J

Introduction

[1] The appellant, a 36 year-old man, was convicted by the Durban regional court on two counts of rape and one count of attempted murder. In sentencing the appellant, on 4 May 2011, the learned regional magistrate took all three counts as one for the purpose of sentence and imposed a sentence of life imprisonment. With the leave of the court *a quo*, the appellant now appeals to this Court against the sentence only. The court *a quo* declined leave to appeal against the convictions. The appeal was opposed by the State.

[2] In respect of the rape charges, the State alleged that the appellant contravened section 3 read with the relevant provisions of the Criminal law (Sexual Offences and Related Matters) Amendment Act, 2007[1] and further read with section 51 of the Criminal Law Amendment Act, 1997 (the 1997 Act)[2], in that on or about 31 January 2008 and at Amanzimtoti in Durban, he unlawfully and intentionally committed an act of sexual penetration with the complainant without her consent, *"by inserting a 750 ml bottle into her genital organ"* (count 1) and *"by inserting his genital organ into her anus"* (count 2). On the attempted murder charge (count 3) it was alleged that the appellant unlawfully and intentionally assaulted the complainant *"by strangling her with his hands and a neck tie, assaulting her with his hands and fists and banging her head against a door and forcing her out of a 10th floor window, with intent to kill her".* The appellant was legally represented at the trial and he pleaded not guilty to all the charges.

The issues on appeal

[3] The issues in this appeal, on which the appellant relied as its grounds in challenging the sentence imposed by the court *a quo*, are the following:

3.1 Whether the court *a quo*, being a regional court, was empowered by law to impose the sentence of life imprisonment for attempted murder under any circumstances.

3.2 Whether the court *a quo* erred in confining itself only to those issues raised during the address in mitigation of sentence by the erstwhile defence

[1] Act 32 of 2007.
[2] Act 105 of 1997, as amended by the Criminal Law Amendment Act 38 of 2007.

counsel and failing to take into account a number of further mitigating factors that were evident from the trial record.

Overview of proceedings in the court *a quo*

[4] The facts and circumstances of this case, in light of the evidence in the court *a quo*, can be summarised as follows. The complainant and the appellant were involved in a romantic relationship for some unspecified period of time. They had started dating each other since time the appellant was still staying at his sister's place in Wentworth, before he moved to his own apartment in Amanzimtoti. According to the complainant, on 31 January 2008, the appellant picked her up from her place of residence (not specified) and they proceeded to his apartment in Amanzimtoti. Realising the room was untidy she started cleaning it up. A short while later she noticed the appellant seated on the floor and smoking something which she did not know what it was. As she put it, she saw some *"white cloud"* emitting from what the appellant was smoking. The appellant had only his shorts on. She knew the appellant smoked cigarettes, but it was not ordinary cigarettes which he was smoking on that day. She had never seen the appellant smoke anything else other than cigarettes. Frightened by the experience, the complainant asked the appellant what he was doing. In response, he petulantly retorted: *"What do you think I am doing, what does it look like?"* Thereupon, the complainant requested the appellant to take her back home as she did not like what she was seeing then. At that stage, according to the complainant, the appellant *"snapped"* and he said to her: *"You see, my wife thought she was clever but I showed her something".* The complainant said she was then even more surprised and shocked because the appellant had previously told her that he was not married.

[5] The complainant proceeded and testified of how the appellant had then become aggressive and violent towards her. He ordered her to take off her clothes. He advanced to her. By then he had taken off his shorts and was naked. It was not possible for her to run out of the house because the appellant had locked the door when they arrived. He ripped her clothes off, including her panties and left her completely naked. He threw her on the bed and she landed on her back. The appellant then got on top of her and pressed on his arms with his knees. When she tried to scream he picked up her blue top or sweater and shoved part of it into her mouth, trying to stop her from screaming. Then he strapped a neck tie around her neck. He pulled the tie from the front and she could barely breathe. The appellant kept on demanding her to tell him *"the truth about what she was doing behind his back"* and about whom it was that she was going out with behind his back. The complainant said she could not understand what the appellant meant because the truth was that there was no other man that she was dating at the time.

[6] The appellant said when she realised that she could hardly breathe due to the suffocation, she nodded her head indicating to the appellant that she was then prepared to talk, even though she knew there was actually nothing for her to say in that regard. Once she had made that signal, the appellant removed the gagging stuff from her mouth and threw her against the built-in wardrobe. He also banged her head against the door. She was continuously screaming. He made her sit down on the floor against the wardrobe and he sat in front of her. He had his handgun placed next to himself in such a way that she would see it. Next to the firearm was the substance that he was smoking, which the complainant assumed was drugs. The appellant asked the complainant, once again, what it was that she was doing behind his back. The complainant denied ever cheating on him.

[7] At that stage the appellant became aggressive and violent towards the complainant, as she kept denying that she was cheating on him. She said, at that moment, *"when I looked at him I just saw evil."* They were still both naked. She then saw a 750ml beer bottle in the appellant's hands and she did not know where he got it from. The appellant said he was going to show her what must be done to a bitch. With her legs apart, the appellant inserted the beer bottle into her vagina and pushed it up. The complainant continued screaming and begging him to stop it as it was hurting her, but he would not. Instead, according to the complainant, the appellant used his foot to shove the bottle even more and deeper inside her vagina. After a while he took the bottle out, pulled the complainant up and threw her onto the bed. Again he demanded her to tell him who the man was that she was going out with. When she said there was no-one he put the gun against the back of her head saying *"Don't fuckin lie bitch."*

[8] Thereafter the appellant put the firearm aside and pulled the complainant's legs apart again. He then approached her from the back and penetrated her anally with his penis. She was screaming, pleading with him to stop as he was hurting her, but he would not listen. He pinned her down with his one hand whilst his other hand he used to push the penis inside her anus, moving forward and backward. After a while he stopped and withdrew his penis. It was at that stage that the complainant said she noticed blood on his penis. She requested to go to the toilet but he refused her to go there. She said he continued and smoked his *thing* again and warned her that she must be prepared to tell him the truth by the time he finished that round of smoking. She requested again to go to the toilet and at that time he allowed her to go.

[9] The complainant said when she got into the toilet she noticed that the window was too small for her to escape through. The appellant then shouted at her to come out. He was aggressive. She then came out and found him waiting for her. He was sitting down at the corner of the room. He started saying strange things such as, as the complainant put it, *"he is going to swear on his mother and his brother's grave that I tell him the truth".* When she asked him what truth he was talking about he hit her on the face with his hand. She was crying all the time, she said.

[10] At that stage the appellant told the complainant to place her hand in his hand as he wanted to pray to God that she should tell him the truth and that only God would tell him whether she was lying to him or not. She complied with his instruction and placed her hand in his. He said when he finished praying she must furnish him with all the names and contact numbers of all the men that she was going out with. She told him there were no such people. Once she said that, he hit her again on the face and she bled from her lip. He pushed her and she collided against the wall. He returned to smoke his "drugs" again.

[11] This pattern of abuse of the complainant by the appellant carried on until, out of the blue, the appellant told the complainant that he in fact loved her and did not want to hurt her. He said he was no longer going to hit her. She was crying most of the time. In about the early hours of the following morning, he escorted her out of the apartment complex into his car. He drove out and took the north-bound freeway towards the city. However, at the Jacobs off-ramp he turned into the direction of Wentworth. He did not tell the complainant where they were proceeding to. The appellant had his gun on his lap to scare the complainant. In Wentworth he pulled up at a certain flat where he went out and collected something contained in a transparent packet from a certain man there.

[12] From there the appellant drove back to his residence in Amanzimtoti with the complainant. That was where the complainant noticed that the contents of the transparent packets were tablet-like substances. The appellant continued where he had left off with the complainant. He grabbed her by the hair, pushed her onto the floor and kicked her on the side of her body, continually calling her a bitch. She said, as she was lying down on the floor, she asked him why he was doing all that to her. He answered arrogantly that it was because he enjoyed it.

[13] Eventually, the appellant went into the bathroom and whilst in the shower he ostensibly had a change of heart, as he told the complainant that she could leave if she wanted to. He indicated to her where she would find the door keys. Hence, the complainant managed to leave the house and understandably thought that her ordeal had come to an end. However, it was not yet to be. Shortly thereafter, the appellant came out running after her. He caught up with her, pinned her on the ground and trying to gag her on the mouth as she was screaming. Fortunately, just in time, three *'Good Samaritans'* appeared and came to her rescue. It was two females and one man. When the appellant saw the three people coming towards them, he ran away. The woman helped the complainant up. Two of these strangers testified at the trial, namely, Hermanus Serfontein and Susanna Erasmus who both corroborated the complainant in relation to the position they found her and the appellant, as well as the physical and emotional condition in which she was at the time. They were both residents in the same apartment building and testified to the effect that they were attracted to the scene by screams of a woman from the direction of the appellant's flat. The police were called to the scene and, subsequently, the complainant was transported to Prince Mshiyeni Memorial Hospital where she was appropriately treated and managed. Dr Kamal Singh

testified on the gynaecological, anal and other bodily injuries which he found on the complainant when he examined her on 1 February 2008. These were consistent of the complainant having been severely sexually abused.

Analysis and evaluation

[14] The ordinary maximum penal jurisdiction of a regional court is 15 years imprisonment and this position is governed by section 92(1)(a) of the Magistrates' Courts Act, 1944[3], which provides as follows:

> "Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence –
>
> (a) by imprisonment, may impose a sentence of imprisonment for a period … not exceeding 15 years, where the court is the court of a regional division; …"

However, section 51(1) of the 1997 Act provides:

> "Notwithstanding any other law, but subject to sub sections (3) and (6), a Regional Court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life."

To the extent relevant to this case, part 1 of schedule 2 refers to:

> "Rape as contemplated in section 3 of the Criminal Law (sexual offences and related matters) Amendment Act, 2007 when committed in circumstances where the victim was raped more than once whether by the accused or any co-perpetrator or accomplice."

[15] Given that the appellant was convicted of having raped the complainant more than once, the matter fell within the ambit of part 1 of schedule 2. Hence the learned

[3] Act 32 of 1944.

regional magistrate was empowered to sentence the appellant to life imprisonment in respect of the rape charges. However, as attempted murder is not included in this category, it follows that the regional magistrate was not empowered to impose life imprisonment in relation thereto. A regional court does not have inherent jurisdiction to impose life imprisonment and, besides, there is no other law in terms whereof the regional magistrate would have been empowered to impose life imprisonment for attempted murder. It follows that the sentence of life imprisonment imposed on the appellant was an incompetent sentence, which falls to be set aside.

[16] Indeed, I agree with counsel for the appellant that, in her judgment on sentence, the regional magistrate appeared to have relied only on the mitigation address by appellant's erstwhile counsel when the regional magistrate concluded that there were no substantial and compelling circumstances justifying a departure from the prescribed sentence of life imprisonment. This conclusion by the regional magistrate is apparent from the record when she remarked as follows[4]:

> "In respect of mitigation of sentence or factors that were submitted on your behalf there were very few. There was just basically two submissions made, that you were married, you have 6 children aged from 5 to 23, and that you were employed on a full-time basis. Your advocate further indicated that imprisonment, as an appropriate sentence, would have a dire effect on your children and that they would become wards of the State. He has also submitted that the previous conviction that you were convicted of, that of drugs in 2000, was quite some time ago and that it did not involve violence. Unfortunately those were the only mitigating factors that were submitted in your favour. (Underlined by me)

The learned regional magistrate continued and said[5]:

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[4] Record, at 366 line 21 to 367 line 5

[5] Record, at 367 lines 11 - 13

> "Now, no substantial or compelling circumstances were put forward by your defence in order for the Court to consider them."

And concluded that[6] -

> " … as far as section 51 of Act 105 of 1977 is concerned, no substantial and compelling circumstances were put before this Court in order to consider justification for a reduction of the prescribed minimum sentence."

[17] It is apparent that the learned regional magistrate departed from the premise that the presentation to the court of evidence or submissions in relation to substantial and compelling circumstances, as envisaged in section 51(3) of the 1997 Act, was only the responsibility of the defence. This was an obvious misdirection on the part of the regional magistrate. As a matter of law, in every case, where none or inadequate information is presented to the court in relation to substantial and compelling circumstances, it is the responsibility of the presiding judicial officer to inquire into the existence or otherwise of such circumstances. This is the position even in instances where the provisions of the 1997 Act do not apply. Such responsibility is not confined only to matters raised by the defence during the mitigation stage, but it extends to the consideration of the entire evidence during the trial.[7]

[18] It was common cause that the appellant and the complainant met in November 2007. Thereafter they developed what the complainant described as *"a very understanding and loving relationship".* The complainant admitted that she and the appellant had consensual sexual intercourse as part of their loving relationship prior to 31 January 2008. She described this as an "*intimate relationship*". Counsel

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[6] Record, at 370 lines 11 – 14

[7] See: *Rammoko v Director Public Prosecutions* 2003 (1) SACR 200 (SCA), at 205 F-G; *S v Dickson* 2000 (2) SACR 304 (C) at 307F-G)

submitted that the evidence of the complainant that the appellant *"just snapped"* was clear indication that his conduct was completely out of character on that particular night. The appellant was a married man with six dependent children of whom he was the primary care giver as his wife was unemployed. He was said to be involved in a number of occupational activities, including being a successful businessman in the rigging industry; a foreman in a construction company and engaged in sub-contract work. Thus he was a productive member of society. These were some of the mitigating factors which counsel submitted that the court a quo failed to take into account in determining the presence or otherwise of substantial and compelling circumstances.

[19] Whilst it may be true that the appellant had never previously behaved in a similar manner toward the complainant or generally, his behaviour and utterances on that night clearly indicated that he had for some time harboured hard feelings against the complainant over what appeared to be unfounded suspicion that the complainant was cheating on him. He only waited for the opportune moment when he would confront the complainant and vent out his anger and frustration on her, in a manner most humiliating and degrading of her privacy and dignity as a human being. In *S v Chapman*[8] the Supreme Court of Appeal appropriately described the crime of rape in the following terms[9]:

> "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping

[8] 1997 (3) SA 341 (SCA)
[9] Ibid, at 345

> and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives".

In *S v C*[10] the Court further amplified as follows:[11]

> "Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim - he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life - a fate often worse than loss of life".

Recently, the Supreme Court of Appeal, in *S v Nkunkuma and others*,[12] declared thus:[13]

> "Rape must rank as the worst invasive and dehumanising violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution. There does not seem to be any significant decline in the incidence of rape since the publication of the statistics referred to above. The same can be said of robbery. No matter how they are viewed, society has called, on more than one occasion, for the courts to deal with offenders of such crimes sternly and decisively".

[20] In the well renown decision of *S v Malgas*[14], the Supreme Court of Appeal made it clear that "*unless there are, and can be seen to be, truly convincing reasons for a different response"* [the] *"courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment"* in these

[10] 1996 (2) SACR 181 (C)
[11] Ibid, at 186d-f
[12] 2014 (2) SACR 168 (SCA)
[13] Ibid at para 17
[14] 2001 (1) SACR 469 (SCA)

cases and that such sentence was "*not to be departed from lightly and for flimsy reasons".* The extreme degree of evil and merciless brutality which the appellant caused the complainant to suffer was an aggravating feature of this case which, in my view, far outweighed any mitigating factors that might be present, including the claim that the appellant committed this horrible and heinous deed whilst under the influence of drugs and that he had no previous convictions involving violence.

[21] I also find it somewhat strange, but indeed significant, that all along, during the trial and beyond, the fact of the appellant's conduct having allegedly been impaired by his intake of drugs was never raised as an issue, in mitigation of sentence or otherwise. This is raised for the first time here on appeal. Its omission all along was clearly not accidental but deliberate – the reason thereof being the fact that the appellant persistently protested his innocence and alleged that the sexual intercourse with the complainant was consensual. Therefore, it seems to me that this sudden reliance on the drug-intake incidence was only opportunistic and self-serving on the part of the appellant, in his apparent realisation of complete absence of substantial and compelling circumstances in this case.

[22] Indeed, despite the overwhelming and reliable evidence against him, the appellant, as pointed out above, persistently denied having done anything wrong or harmful to the complainant and insisted that the complainant had been a willing participant in the *"rough sex"* in which they had both engaged and ostensibly enjoyed. He denied up to the end ever shoving a beer bottle up the complainant's vagina – indeed, a spine-chilling act in everyone's imagination. He simply showed no remorse whatsoever for his actions.

[23] To my mind, on the facts of this case, there was no misdirection on the part of the court *a quo* in its finding that substantial and compelling circumstances did not exist in this case. In the circumstances, this Court may not interfere with the sentence imposed by the court *a quo* in respect of the rape convictions. However, for the attempted murder conviction, it seems to me that a sentence of ten years imprisonment, which should be ordered to run concurrently with the life imprisonment imposed in respect of the rape convictions, would be appropriate.

The order

[24] In the result, the following order is made:

1. The appeal against the sentence for the rape convictions is dismissed. However, the appeal against the sentence for the attempted murder conviction is upheld.

2. The sentence imposed by the court *a quo* is altered to read as follows:

> "Counts 1 and 2: Both counts are treated as one for the purpose of sentence: The accused is sentenced to imprisonment for life.
>
> Count 3: The accused is sentenced to undergo 10 (ten) years imprisonment.
>
> It is ordered that the sentence imposed on count 3 shall run concurrently with the sentence imposed on counts 1 and 2."

3. The new sentence shall be antedated to the date of the original sentence, i.e. 4 May 2011.

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NDLOVU J

_____ I agree.

NTSHANGASE J