

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



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH WEST DIVISION, MAHIKENG)

CASE NO: CA 29/2018

REGIONAL COURT CASE NO: RC 84/2015

In the matter between:

KAGISO GLADWIN THAMAGA

APPELLANT

and

THE STATE

RESPONDENT

Coram: Djaje DJP *et* Scholtz AJ

Heard: 30 November 2023

Handed down: 04 March 2024

For the Appellant: Adv O. Ntsamai

For the Respondent: Adv F. Monyai

JUDGMENT

SCHOLTZ AJ

INTRODUCTION

[1] The Appellant, **MR KAGISO GLADWIN THAMAGA**, had been convicted of rape and robbery with aggravating circumstances on **21 NOVEMBER 2017** in **THE REGIONAL COURT FOR THE DISTRICT OF NORTH WEST, HELD AT ITSOSENG**. The Appellant had been sentenced on count 1 (being rape) to **10 (Ten) years** imprisonment, and on count 2 (being robbery with aggravating circumstances) to **15 (Fifteen) years** imprisonment. These sentences were not to run concurrently.

[2] The Appellant applied for Leave to Appeal in respect of sentence, which had been granted by the *Court a quo*. Consequently, this matter now comes before this Court for adjudication.

[3] The matter had been decided upon the papers, as requested by Counsel for both the Appellant and the Respondent. Comprehensive Heads of Argument were filed by both Counsel, in terms whereof legal submissions for the Appellant and Respondent were made.

The facts

[4] The facts of the matter can briefly be summarised as follows:

- (a) The complainant intended to attend to a Church service. She (accompanied by **3 (Three)** other women), were walking. Suddenly **3 (Three)** male persons appeared. They made the complainant (and

the other women) to kneel and instructed them to take out their cell phones. The Appellant was part of the men referred to above.

- (b) The complainant took her Blackberry phone out of her pocket.
- (c) The Appellant had a knife with him. He instructed the complainant to undress her underwear, and raped the complainant.
- (d) The Appellant thereafter took the complainant's Blackberry phone, and later sold it to a third party.
- (e) The Appellant, as mentioned, now appeals to this Court in respect of his sentence.

[5] It should be stated that this Court (in its capacity as Appeal Court), will not lightly interfere with the sentencing discretion of the Trial Court, and will only do so in the event of a material misdirection by such Court.

[6] The Appellant's grounds of Appeal are based on the following:

- (a) That there were substantial and compelling circumstances which justified the imposition of a lesser sentence, as the prescribed minimum sentence to the offences which the Appellant had been found guilty of.
- (b) That the sentences ought to have run concurrently in terms of **SECTION 280 (2) OF THE CRIMINAL PROCEDURE ACT.**

Appellant's personal circumstances

[7] The Appellant raised the following grounds, as being substantial and compelling circumstances, namely:

- (a) The Appellant was a first-time offender.

- (b) The Appellant can be rehabilitated.
- (c) That the Appellant has **2 (Two)** minor children which he must support financially.

First time offender

[8] Though it may be the case that the Appellant was a first-time offender, the charges upon which he was convicted, are of a very serious nature. The *Court a quo* during sentence duly considered the fact that the Appellant was a first-time offender. This Court finds that the seriousness of the offences far outweighs the fact that the Appellant was a first offender, and this ground can therefore not be a substantial and compelling ground to depart from the prescribed minimum sentences as laid down for these offences.

Appellant as candidate for rehabilitation

[9] As mentioned, the Appellant had been convicted of very serious offences, and justice would have not been served, if a long period of imprisonment had not been imposed on the Appellant.

[10] The *Court a quo* correctly found that it was not its intention to impose a sentence which has an element of revenge in it; and that it was rather the duty of the *Court a quo* to impose a sentence on the Appellant which will ensure that the Appellant will come back into society as a rehabilitated person.

[11] It is clear that the *Court a quo* duly considered the aspect of rehabilitation, and found that the sentences were appropriate in the circumstances.

[12] This Court finds that the issue of possible earlier rehabilitation by the Appellant do not constitute substantial and compelling circumstances to

deviate from the prescribed sentences, laid down for the offences which he had been convicted of.

Appellant has minor children which he support financially

[13] The Appellant has **2 (Two)** minor children with different mothers, respectively **6 (Six)** and **2 (Two)** years of age (as on date of sentence).

[14] This factor had also been properly considered by the *Court a quo*, to such an extent that the *Court a quo* found that these children's unemployed mothers did receive social grants for the minor children, and the children will be financially supported, during the Appellants period of incarceration.

[15] The Appellant's duty to contribute in respect of the maintenance of these two children can therefore not be considered as substantial and compelling circumstances to depart from the prescribed minimum sentence for these offences.

Sentences ought to have run concurrently

[16] In the second leg of his Appeal, the Appellant rely on the fact that the *Court a quo* erred in not ordering that the sentences on Count 1 and Count 2 should run concurrently.

[17] The Appellant allege that both offences had been committed during the same incident, and that the offences are accordingly intertwined.

[18] **SECTION 280 (2) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**
state that:

(1) *When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the Court may sentence him to such several punishments for such offences*

or, as the case may be, to the punishment for such other offence, as the Court is competent to impose.

(2) *Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the Court may direct, unless the Court directs that such sentences of imprisonment shall run concurrently.”*

[19] From this Section of the Criminal Procedure Act, it is clear that sentences shall commence, the one after the other, except when a Court expressly direct that sentences shall run concurrently. The *Court a quo*, specifically ordered that the sentences in respect of Count 1 and Count 2 will not run concurrently.

[20] The effect of the *Court a quo*'s order referred to *supra*, is that the sentences are served cumulatively, the one after the expiration of the other.

[21] In **S v MATE 2000 (1) SACR 552(1)** it was found that when there is a close link between offences, the concurrence of sentences is appropriate. In **S v RADEBE 2006 (2) SACR 604 (0)** it was decided that when the offences were committed at the same time, it can justify concurrences of the sentences. In **DLAMINI AND ANOTHER v STATE (2006) SCA 110** it was pointed out that where there is an overlap between offences arising from the same incident, it should be taken in account to avoid a “duplication of punishment”.

[22] It is clear from the record that the rape and robbery occurred during one incident, and that in this Court's view, justified an order that the sentences run concurrently.

[23] Being mindful of the aforesaid authority, as well as the fact that the purpose of sentence is not to break the Appellant, but rather to rehabilitate the

Appellant, this Court finds that the sentences should run concurrently, in terms of the provisions of section 280(2) of the Criminal Procedure Act.

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

- (1) The appeal is upheld.
- (2) The sentences on Count 1 and 2 are to run concurrently in terms of the **PROVISIONS OF SECTION 280(2) OF THE CRIMINAL PROCEDURE ACT.**

H.J. SCHOLTZ
ACTING JUDGE
NORTH WEST DIVISION, MAHIKENG

I agree

J T DJAJE
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG