THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 859/2022

In the matter between:

SIYABONGA MTHANTI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Mthanti v The State* (Case no 859/2022) [2024] ZASCA 15 (8 February 2024)

Coram: DAMBUZA, HUGHES, and MATOJANE JJA and WINDELL and MALI AJJA

Heard: 18 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 8 February 2024 at 11h00.

Summary: Criminal law – sentence – appeal in terms of s 316B of the Criminal Procedure Act 51 of 1977 (CPA) against sentences imposed – appellant convicted of a series of offences including assault with intent to do grievous bodily harm, robbery with aggravating circumstances and rape – whether there was duplication of

sentences – whether minimum prescribed sentences applicable under s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) applicable – whether the appellant when committing rape had already been convicted of two or more offences of rape – appellant not yet sentenced in respect of such convictions – involvement of grievous bodily harm as provided in Part I (c) of Schedule 2 to the CLAA – whether there were substantial and compelling circumstances to justify the imposition of lesser sentences – no substantial and compelling circumstances found.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Nkosi and Pillay JJ and Reddi AJ sitting as court of appeal):

1 Save to the extent set out below the appeal is dismissed.

2 The order of the full court is set aside and replaced with the following:

'2.1 Counts 1, 2, and 5 are taken together for purposes of sentence. The accused is sentenced to 15 years' imprisonment.

2.2 Counts 3 and 4 are taken together for purposes of sentence. The accused is sentenced to life imprisonment.

2.3 In respect of count 6 the accused is sentenced to 15 years' imprisonment.

2.4 All the sentences are to run concurrently.

2.5 All the sentences are antedated to 1 April 2015.'

JUDGMENT

Mali AJA (Dambuza, Hughes and Matojane JJA and Windell AJA concurring):

[1] The appellant, Mr Siyabonga Mthanti was convicted and sentenced by the KwaZulu-Natal Division of the High Court, Pietermaritzburg, (the high court) on three counts of robbery with aggravating circumstances, a count of assault with intent to cause grievous bodily harm and two counts of rape. The sentences were imposed as follows: (a) 15 years' imprisonment for the three counts of robbery with aggravating circumstances (counts 1, 2 and 5), (b) life imprisonment for the counts of assault with intent to do grievous bodily harm and the first count of rape (counts 3 and 4), and (c) life imprisonment on the second count of rape (count 6). His appeal to the full court of the same division against the sentences imposed in respect of counts 2 to 6 was dismissed. He now appeals, with the leave of this Court, against the dismissal of his appeal by the full court.

[2] The appellant's convictions and sentences relate to three incidents that occurred between June 2014 and January 2015. In all three incidents the appellant used the same method of enticing the victim to an isolated spot under false pretences of employment offer. There he either threatened to or stabbed them with a knife, and robbed and raped them.

[3] The first incident was preceded by interaction between the appellant and the first complainant, on a social media site known as OLX, a site used by employment advertisers and job seekers. There the appellant, pretending to be Siyabonga Ncula, advertised a job. On 16 June 2014 the first complainant, following the appellant's instructions, took a taxi from her home in Newlands, eThekwini to meet the appellant in Pietermaritzburg. The appellant led the first complainant to a secluded spot where he robbed her of two cellular phones at knife point. He then instructed her to undress whilst grabbing her, but she managed to wrestle free and run away. The conviction on count 1 related to this event.

[4] The second incident occurred on 26 August 2014 when the appellant assaulted, robbed and raped the second complainant. In the same manner as the first incident, this incident too followed communication between the appellant (pretending to be a Mrs Zuma) and the second complainant, on a social media known as Date Club. In that interaction the appellant offered the second complainant a job as a domestic worker. On the appellant's instructions the second complainant arrived at Elandskop Pietermaritzburg, having boarded a taxi from her home in Port Shepstone. The appellant met her as arranged and led her to a spot where he stabbed her on the back with a knife and robbed her of her money and a cellular phone. Having threatened to stab her again he then ordered her to undress and he raped her.

[5] Thereafter the second complainant put on her clothes and asked him for directions to Mrs Zuma's house. On following the directions given to her by the appellant the second complainant walked into a forest where, and after having walked a very long distance she eventually reached an informal settlement where she was taken to a police station. She used her rescuer's cellular phone to call the phone number that the appellant had given her as Mrs Zuma's, only to discover that was, in

fact, the appellant's phone number. The convictions on counts 2, 3 and 4 related to this incident.

[6] The complainant in the third incident travelled from Mthwalume, Port Shepstone to meet the appellant in Pietermaritzburg. On this occasion the appellant had pretended to be a Mr Zikhali when he offered the third complainant a job as a childminder. When the appellant came to meet the complainant, he was in the company of someone referred to as Andile. The three of them walked along a footpath to a spot where the appellant suddenly grabbed the complainant by the neck from behind. He then took one of the complainant's cellular phones and identity document and ordered her to give her second cellular phone to Andile. Thereafter the appellant, while pointing a knife at the complainant's neck, proceeded to rape her in the presence of his friend Andile, whilst she pleaded with him not to kill her. At some stage the appellant invited Andile to also participate in the rape but the latter refused. Andile gave the complainant's cellular phone back to the appellant and walked away from the scene. The convictions on counts 5 and 6 related to this incident.

[7] The approach of the high court in sentencing the appellant was rather unusual when imposing sentence, the court took together all three counts of robbery with aggravating circumstances from the three different incidents and sentenced the appellant to a 15 year term of imprisonment. It then combined the counts of assault with intention to cause grievous bodily harm and rape from the second incident for the purpose of sentencing and imposed a sentence of life imprisonment. The court then imposed a further life sentence in respect of the conviction of rape in the third incident.

[8] The general approach to sentencing is to determine an appropriate sentence for each individual offence of which an accused is convicted. Of particular relevance in this case is that although the perpetrator in the three incidents was the same, and the offences were similar, the victims were three different individuals and the incidents were unrelated. On the correct approach the sentences imposed had to account for the aggravating and mitigating circumstances attendant in each offence committed. The imposition of a single sentence in respect of the unrelated crimes (counts 1, 2 and 5) was inappropriate. Nevertheless, it redounded in the appellant's favour, and there

is no counter-appeal in respect thereof. In addition, counts 3 and 4 were considered together for the purpose of sentencing.

[9] In this appeal the appellant contends, first, that in respect of the second incident there was duplication of convictions and therefore improper punishment. The argument posits that even though the appellant was found guilty of three separate offences (rape, robbery with aggravating circumstances and assault with the intent to do grievous bodily harm), he had a single intent: he used the knife to subdue the complainant with the intention of carrying out the robbery and rape of the complainant (counts 1 and 3). Therefore, the conviction of assault with intention to cause grievous bodily harm (count 2) resulted from an impermissible duplication of charges which led to duplication of punishments. The second leg on which the appeal stands is that the first rape did not involve the infliction of grievous bodily harm as provided in item (c) of Part I in Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA) read with s 51(1) of that Act. Therefore, he should not have been sentenced to life imprisonment in respect thereof. Thirdly, he contends that when he was sentenced for the second rape in the third incident (count 6) he had not yet been convicted of two or more incidents of rape as provided in the same law. The second rape therefore did not attract the sentence of life imprisonment. Lastly, he contends that his personal circumstances, when considered cumulatively, constitute substantial and compelling circumstances that justify deviation from the minimum sentences prescribed in the CLAA.

[10] The law pertaining to the duplication of punishment has been established in many cases. In *S v BM*,[1] this Court remarked that:

'It has been a rule of practice in our criminal courts since at least 1887 that 'where the accused has committed only one offence in substance, it should not be split up and charged against him in one and the same trial as several offences". The test is whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one has been committed. *The purpose of the rule is to prevent a duplication of convictions on what is essentially a single offence and, consequently, the duplication of punishment.' (Emphasis added.).*

[1] *S v BM* [2013] ZASCA 160; 2014 (2) SACR 23 (SCA) para 3.

[11] Firstly, it is necessary to highlight that the appeal in this Court is not against the convictions. Consequently, any contention advanced in order to impugn any of the convictions is impermissible. Secondly, the high court took count 2 (assault to do grievous bodily harm) and count 3 (rape) together for purposes of sentence. Thirdly, the high court found that the rape in count 3 involved the infliction of grievous bodily harm that attracted a life sentence.[2] The result was one sentence of life imprisonment in respect of both counts. Because the two offences were grouped together, this approach did not result in the duplication of punishment.

[12] With regard to the second ground of appeal – that the injury sustained by the complaint did not constitute grievous bodily harm, it is apposite to observe, first, that there is no definition of grievous bodily harm in the CLAA. The courts have held that while the injury should not be trivial or insignificant, it need not be necessarily life threatening, dangerous or disabling. The relevant considerations in assessing whether grievous bodily harm was inflicted include the nature of the injury sustained, the seriousness of that injury, its position on the body, the object used in inflicting it, the number of wounds sustained, and the results that flowed from the infliction.[3] In addition, the meaning of grievous bodily harm must be understood within the context of its use in the Criminal Law (Sexual Offences and Related matters) Amendment Act 32 of 2007.

[13] Item (c) of Part I of Schedule 2 of the CLAA, which prescribes the minimum sentence of life imprisonment for rape offences 'involving the infliction of grievous bodily harm', must be understood within the context of the rampant levels of sexual offences in this country. The purpose is to ensure that appropriate punishment is imposed for violent conduct that is designed to induce submission to sexual intercourse, given that rape, on its own, is a violent, degrading act. The analogy drawn by the appellant between the infliction of harm in this case and the harm sustained by the complainant in *S v Nkomo,*[4] *(Nkomo)* is therefore inappropriate. In *Nkomo* the court was concerned with injuries sustained by the complainant whilst trying to escape from the appellant. In this case, however, it is common cause that the appellant stabbed

[2] Item (c) of Part I of Schedule 2 of the CLAA.
[3] *S v Rabako* [2007] ZAFSHC 47*;* 2010 SACR 310 (O).
[4] *S v Nkomo* [2006] ZASCA 139; [2007] 3 All SA 596 (SCA); 2007 (2) SACR 198 (SCA) para 15.

the complainant with a knife to subdue her so that he could rape her. The stab wound sustained by the second complainant was a 0,5 cm wide laceration. It was located at the level of the T5 (the fifth thoracic vertebra), to the left of the vertebral column.[5] The depth could not be ascertained because the wound was sutured at the clinic before the doctor who gave evidence in court examined the complainant.

[14] There was no suggestion on appeal that the high court was wrong in its conclusion that the suturing of the wound meant that it was not superficial. Consequently the finding that that the rape involved the infliction of grievous bodily harm cannot be faulted. Thus, the appellant fell to be sentenced as provided in s 51(1) read with Part 1 of Schedule 2 of the CLAA and the trial court did not misdirect itself in imposing the minimum sentence of life imprisonment.

[15] With regard to the sentence of life imprisonment imposed for count 6, the high court found that the offence attracted the minimum prescribed sentence under s 51(1), Part I *(a)*(iii) of Schedule 2 of the CLAA because it was a second conviction of rape committed by the appellant. The court erred in this regard.

[16] In *S v Mahomotsa*[6] Mpati JA set out the correct interpretative approach to Part I *(a)*(iii):

'Here the accused had been arrested on the first count, appeared in court where he was released in the custody of his grandmother, but within a period of just over two months he committed a similar offence in almost a similar fashion. What must be remembered, however, is that at the time of the second rape, the accused had not yet been convicted on the first count. Again this is, of course, no excuse. But the Legislature has itself distinguished him from persons who, having been convicted of two or more offences or rape but not yet sentenced, commits yet another rape. If, for example, the accused in the first instance had not raped the first complainant more than once and he then in the second instance raped the second complainant only once while awaiting trial on the first count the prescribed sentence of life imprisonment would not have come into reckoning.'

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[5] *Dorland's Illustrated Medical Dictionary* 33 ed 2020 refers to the vertebrae as 'any of the small irregular bones of the vertebral column which comprises of seven *cervical*, twelve *thoracic*, and five *lumbar* vertebra.'[5] The T5 is the fifth *thoracic* vertebra closest to the skull.

[6] *S v Mahomotsa* [2002] ZASCA 64; [2002] 3 All SA 534 (SCA); 2002 (2) SACR 435 (SCA) para 20.

[17] Section 51(1) of the CLAA provides that 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 I *(a)* in Schedule 2 specifies the circumstances in which the offence of rape will attract the sentence of life imprisonment. In terms of that provision the sentence of life imprisonment becomes applicable where rape is committed 'by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions'.

[18] It is apparent that the appellant was not yet convicted of rape in count 4. Therefore, the imposition of life imprisonment was a misdirection. The State conceded to the misdirection. This misdirection justifies interference by this Court, and we are entitled to consider the sentence afresh. Part III of Schedule 2 of the CLAA provides for a minimum sentence of 10 years' imprisonment. Taking into account, amongst other things, the appellant's *modus operandi* and the impact of the rape as fully discussed below, the sentence of 10 years' imprisonment does not fit the crime in the circumstances. Fifteen years' imprisonment is the appropriate sentence under the circumstances.

[19] The last issue is whether there were substantial and compelling circumstances that justified deviation from the minimum prescribed sentences in this case. It is apparent from the above description of the events that took place on the three occasions that the aggravating circumstances present when committing the crimes by far outweighed the mitigating factors. The high court was correct in considering that the appellant's criminal conduct was not 'fleeting and impetuous'; that it was 'calculated and callous', and that there was no reason to deviate from the prescribed minimum sentences.

[20] The only submission made on appeal was that the appellant's mother died when he was 7 years old. The suggestion was that the appellant was troubled by the fact that his mother died without revealing the identity of his father. But all of this was considered by the high court. The court also considered in the appellant's favour, his personal circumstances - that he was gainfully employed at the time of his arrest for the offences in question and supporting his two minor children. It considered that although he lost his only biological parent early in his life, his uncle and aunt gave him

a ‘good and warm upbringing’ until he abandoned his post matric studies without telling them’. The court considered that the appellant was a first offender.

[21] The appellant ruthlessly exploited the vulnerabilities of the most exposed members of our society. He preyed on those most affected by the high levels of unemployment in the country. He deceived women, causing them to leave the security and comfort of their homes. He caused them to use their meagre financial resources to travel to Pietermaritzburg. He robbed them of their scant belongings and then humiliated the second and third complainants by raping them. In respect of the third complainant the rape happened in the most degrading manner, in the presence of a third person. He then left the complainants to their own devices in remote places at night. This he did repeatedly, as the high court correctly found. In all three incidents there was no basis for a departure from the prescribed minimum sentences.

[22] Accordingly I grant the following order:

1 Save to the extent set out below the appeal is dismissed.

2 The order of the full court is set aside and replaced with the following:

‘2.1 Counts 1, 2, and 5 are taken together for purposes of sentence. The accused is sentenced to 15 years’ imprisonment.

2.2 Counts 3 and 4 are taken together for purposes of sentence. The accused is sentenced to life imprisonment.

2.3 In respect of count 6 the accused is sentenced to 15 years’ imprisonment.

2.4 All the sentences are to run concurrently.

2.5 All the sentences are antedated to 1 April 2015.

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N P MALI

ACTING JUDGE OF APPEAL

Appearances

For appellant:	M M Chithi (with T Khowa)
Instructed by:	Shoba Sandile Attorneys, Durban
	Blair Attorneys, Bloemfontein
For respondent:	Elsa Smith
Instructed by:	The Director of Public Prosecutions, Pietermaritzburg
	The Director of Public Prosecutions, Bloemfontein.