THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 675/2017

In the matter between

DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE **APPELLANT**

and

SELLO JOSEPH MASHUNE **RESPONDENT**

Neutral citation:	*DPP, Free State v Mashune* (675/17) [2018] ZASCA 60 (18 May 2018)
Coram:	Lewis and Dambuza JJA and Rogers AJA
Heard:	3 May 2018
Delivered:	18 May 2018

Summary: Criminal law – appeal by State against sentences for two counts of housebreaking with intent to rape and rape – misdirections by trial court in respect of supposed remorse, youthfulness and absence of physical injury – no substantial and compelling circumstances – heavier sentences than those prescribed justified for two rape convictions.

ORDER

On appeal from: The Free State High Court (Mhlambi J sitting as court of first instance).

(1) The appeal succeeds.

(2) The sentences imposed by the court a quo are set aside and replaced with the following:

'(a) In respect of count 1, the respondent is sentenced to fifteen years' imprisonment.

(b) In respect of count 2, the respondent is sentenced to fifteen years' imprisonment of which eight years shall run concurrently with the sentence imposed in respect of count 1.

(c) The sentences are antedated to 20 April 2017.'

JUDGMENT

Rogers AJA (Lewis and Dambuza JJA concurring)

[1] This is an appeal by the State, with the leave of the court a quo granted in terms of s 316B of the Criminal Procedure Act 51 of 1977, against the sentences imposed by the court a quo on the respondent. The State contends that the court a quo materially misdirected itself in several respects and that the sentences are disturbingly lenient.

[2] The respondent pleaded guilty to two counts of housebreaking with intent to rape and rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. By agreement the J88 medical reports were handed in.

[3] In respect of the first count, the respondent's statement in terms of s 112(2) of the Criminal Procedure Act disclosed that on the evening of 5 October 2007 he drank at a tavern for some hours. In the early hours of the next morning, at around 02h00, he broke into the dwelling of the complainant, Nonqazi Matheatau, and raped her vaginally without using a condom. He did not know her. Afterwards, while he was dressing, she jumped up from the bed and grabbed him around the neck, screaming for help. He pushed her away and hit her in the face with his fists. Although he was drunk when he left the tavern, he was not so drunk that he did not know what was happening around him. He knew that his actions were unlawful.

[4] In respect of the second count, the respondent's statement disclosed that at around 03h00 on 26 December 2010 he broke into the dwelling of the complainant, Dimakatso Masukela, and raped her vaginally, wearing a condom. In order to subdue her struggling, he punched her in the face with his fists. He had known the complainant for a long time but at no stage had a romantic relationship with her.

[5] The respondent having been duly convicted in accordance with his plea, the State proved the following previous convictions: (a) housebreaking with intent to steal and theft – committed in September 2001 – sentence of 12 months' imprisonment imposed in August 2002; (b) housebreaking with intent to steal – committed in August 2004 – sentence of five years' imprisonment imposed in October 2004; (c) rape in contravention of s 3 of Act 32 of 2007 – committed in February 2014 – sentence of seven years' imprisonment imposed in October 2015.

[6] The respondent was born on 8 June 1979, so he was 28 at the time of the first rape and 32 at the time of the second.

[7] In aggravation of sentence the State called the complainant in the second count and the investigating officer. The latter testified that another man was initially tried on the first count but acquitted. Pursuant to the respondent's conviction for the rape committed in February 2014, he was linked by DNA evidence to the two rapes which are the subject of the present case. The investigating officer visited the complainant in the first count at her place of employment to ask her to come to court. She broke down and cried in front of other staff members, telling him that she was not able to look the accused in the eye.

[8] The complainant in the second count testified that she had known the respondent since he was a youngster. His parents lived nearby. She knew his mother and grandmother. Since the rape she can no longer stay alone in a house. For a long time after the rape she hated men but had recently started a relationship with a boyfriend. She became ill with depression and only completed her treatment in 2016. She was not willing to accept the respondent's apology.

[9] The respondent testified in mitigation. He progressed to grade 11 in school. He is divorced and the father of twins born in 2012. He asked the complainants to forgive him and said he was very remorseful. He claimed that his guilty plea was not the result of the DNA evidence that implicated him but because he realised what he had done was wrong.

[10] Strictly speaking, each count in the present case involved two distinct offences, namely (a) housebreaking with intent to commit rape; and (b) rape (*S v Zamisa* 1990 (1) SACR 22 (N) at 23d-e.) However, since the indictment was framed as if each housebreaking and the ensuing rape constituted a single offence, and since the contrary was not argued, I shall approach the case as if the

respondent was convicted of two offences, not four. This is what the court a quo did.

[11] In the case of the two rapes, the respondent was, for purposes of the legislation, a first offender (the rape conviction in October 2015 post-dated the rapes with which he was charged in the present case), so the minimum sentence in respect of each rape was ten years' imprisonment in terms of s 51(2)*(b)*(i) read with Schedule III.

[12] The court a quo found that there were substantial and compelling circumstances to depart from the minimum sentences, and sentenced the respondent to nine years' imprisonment on each count, the sentences to run concurrently. The court a quo reached this conclusion on the following grounds: (a) that the respondent pleaded guilty in circumstances where he could easily have pleaded not guilty and required the State to prove its case; (b) that he expressed heartfelt remorse; (c) his youthfulness; (d) the prospect of rehabilitation, coupled with the fact that he is the father of two young children; (e) that the complainants suffered no serious injuries.

[13] The court a quo's approach involved serious misdirection. As to the respondent's guilty plea and professed remorse, his evidence should not have been accepted. It is not in dispute that he was linked to the rapes by DNA evidence obtained in connection with the unrelated rape he committed in February 2014. Since swabs were promptly taken from the complainants in the present case, the case against the respondent was strong. His supposed remorse only followed his arrest in the present case and came nine years after the first rape and six years after the second.

[14] Remorse entails taking responsibility for one's actions. Despite the passing of a number of years, this is not something the respondent did. On the contrary, in

February 2014 he raped another woman. Although the conviction for the 2014 rape is not a prior conviction in the true sense, the court a quo could and should have taken it into account in assessing the accused's character, his propensity for rape, his prospect for rehabilitation and the genuineness of his remorse (see *R v Zonele & others* 1959 (3) SA 319 (A) at 330D-331B; *S v S* 1988 (1) SA 120 (A) at 123E-H).

[15] As to the respondent's supposed youthfulness, he was 28 and 32 respectively at the time of the rapes with which this case is concerned. In *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) Ponnan JA was critical of the trial judge's use of the phrase 'relative youthfulness' without any attempt at defining what exactly that meant in respect of the particular individual. Ponnan JA said that while someone under the age of 18 years could be regarded as naturally immature, the same does not hold true for an adult and that a person of 20 years or more must show by acceptable evidence that his immaturity was such as to operate as a mitigating factor. In the present case there was no justification for the court a quo to treat the respondent as an immature offender.

[16] As to the respondent's prospects of rehabilitation, one never wishes to rule this out as a possibility. In the present case, however, the prospect of rehabilitation did not rise to the level of a substantial and compelling circumstance. On the contrary, the respondent's previous convictions for housebreaking indicate that he has not learnt lessons from milder punishment. The first housebreaking and rape in the present case were perpetrated while the respondent was on parole for the second of his previous housebreaking convictions.

[17] As to the absence of 'serious injuries', s 51(3)*(aA)* states that the absence of apparent physical injuries does not qualify as substantial and compelling circumstances for rape. While s 51(3)*(aA)* does not preclude a court from having

regard to the absence of physical injuries in combination with other factors in arriving at a conclusion that substantial and compelling circumstances exist (*Mudau v S* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA) para 26), on its own (and here there is nothing else) the absence of physical injury does not suffice.

[18] This said, the J88 report in respect of the first rape reflects that the complainant suffered vaginal tearing and some bruising and abrasions on her face and body. While the second complainant's apparent physical injury was limited to swelling and redness around her mouth, she suffered depression for which she underwent treatment for six years. Depression is a serious illness which materially affects a person's quality of life.

[19] Since the court a quo's finding of substantial and compelling circumstances cannot be sustained, we must consider sentence afresh. Self-evidently the respondent must, at the very least, receive the prescribed minimum punishment. The only question is whether there are grounds to impose more severe sentences. In each case, there are aggravating features. The most important is that the respondent broke into the complainants' dwellings and forced himself on them in the early hours of the morning while they lay sleeping in their beds. The shock must have been truly terrifying for them. The respondent used physical force, punching them in their faces. Since each housebreaking and ensuing rape is being treated as a single offence, the respondent's previous convictions for housebreaking are aggravating features of the composite crimes. The 2014 rape must also go into the scales against him.

[20] In all the circumstances, I consider that sentences of fifteen years' imprisonment should be imposed for each of the two convictions. The cumulative effect of 30 years' imprisonment on top of the seven-year sentence which the respondent is already serving for the 2014 rape would, however, be

disproportionate. On the other hand, complete concurrency of sentences would not reflect the gravity of the offences, which were entirely unconnected with each other in circumstances and point of time. I consider an effective period of 22 years' imprisonment would be just.

[21] The following order is thus made:

(1) The appeal succeeds.

(2) The sentences imposed by the court a quo are set aside and replaced with the following:

'(a) In respect of count 1, the respondent is sentenced to fifteen years' imprisonment.

(b) In respect of count 2, the respondent is sentenced to fifteen years' imprisonment of which eight years shall run concurrently with the sentence imposed in respect of count 1.

(c) The sentences are antedated to 20 April 2017.'

O L Rogers

Acting Judge of Appeal

APPEARANCES

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For Respondent	S Kruger Legal Aid South Africa Bloemfontein