

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)**

Case no: CA108/2013
Date heard: 30 January 2015
Date delivered: 3 February 2015

In the matter between

BRIAN COCK**Appellant**

VS

THE STATE**Respondent**

Case no: CA121/2014
Date heard: 30 January 2015
Date delivered: 3 February 2015

And in the matter between

ELTON MANUEL**Appellant**

VS

THE STATE**Respondent**

JUDGMENT

PICKERING J:

1. There are before us two separate appeals to the Full Bench of this Division by two appellants, namely Brian Cock and Elton Manuel, each appeal being directed against the sentence of life imprisonment imposed upon them consequent upon their convictions on a charge of rape.

2. The convictions of both appellants arose out of the same incident, the State having alleged that on 26 December 2010 the complainant was raped by both appellants who were acting in the furtherance or execution of a common purpose to rape her.

3. The one appellant, Cock, was apprehended during 2012. He appeared before Dilizo AJ in the High Court, sitting at Graaff-Reinet, charged with robbery with aggravating circumstances (count 1) and rape (count 2). In respect of count 1 the appellant was advised of the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (“the Act”) relating to the application of the prescribed minimum sentence of 15 years’ imprisonment in that aggravating circumstances were alleged to have been present in the commission of the robbery.

4. In respect of count 2 the appellant was advised of the provisions of s 51(1) of the Act relating to the application of the prescribed minimum sentence of life imprisonment in that the complainant was raped by more than one person acting in the execution or furtherance of a common purpose and/or grievous bodily harm was inflicted on her during the rape. The appellant pleaded guilty as charged to both counts and was duly convicted during January 2013 on the basis of his plea explanation which reads as follows:

- “1. *I am the accused in case no CC63/2012 and I know and understand the charges against me.*
- 2.1 *I admit that I am guilty of the crime of Robbery as stated in charge 1 of the indictment.*
- 2.2 *I admit that on the 26th of December 2010 near Midros Middelburg I unlawfully threatened G K with a knife and then took from her one cellphone with the intention of selling it.*
3. *I further admit that I am guilty of the crime of Rape as stated in count 2 in that on the same day and place, I together with my companion Elton Manuel pulled the Complainant to a donga where both of us sexually penetrated her without her consent.*
4. *That night I and my companion had consumed strong liquor at a Tavern. When we met the complainant I was drunk but still knew what I was doing and that it was wrong.*
5. *I am willing to assist the Police in apprehending my companion and prosecuting him if requested.”*

5. On count 1 substantial and compelling circumstances were found to be present and appellant was sentenced to undergo 7 years' imprisonment. On count 2 no substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum sentence were found to be present and he was sentenced to life imprisonment. He appeals now only against the sentence of life imprisonment with the leave of the court a quo.

6. The other appellant, Manuel, was only apprehended after Cock had already been convicted and sentenced. He appeared before Malusi AJ in the High Court, sitting at Graaff-Reinet, also charged with robbery with aggravating circumstances and rape. He too pleaded guilty as charged to both counts and was duly convicted on the basis of his plea explanation which reads as follows:

- “1. *I, Elton Manuel, am the accused in this matter.*
2. *I understand the charges against me and confirm that I make this statement without undue influence.*
3. *I plead guilty to both charges.*
4. *On 26 December 2010 at or near Midros, Middelburg, in the early hours of the morning, one Brian Cock and I met up with the complainant, G K, and her boyfriend as they were walking together.*
5. *Brian produced a knife and the complainant's boyfriend ran away. Brian threatened the complainant with the knife and took 2 cell phones from her. He told her to accompany us and when she argued with him, he hit her in the face.*
6. *We then took the complainant to a ditch. Brian held a knife against the complainant's throat and I pulled down her pants. I then raped her, i.e. had sexual intercourse with her without her consent. After that Brian also raped her.*
7. *I admit that both Brian Cock and I acted with the common purpose to rob and rape the complainant and that I associated myself with Brian's actions.*

8. *I admit that I knew what I did was wrong.*
9. *I therefore admit that I shared with Brian Cock the common purpose to unlawfully and intentionally assault the complainant and take by force from her her property.*
10. *I also admit that I unlawfully and intentionally had sexual intercourse with the complainant vaginally without her consent.”*

7. On count 1 he was sentenced to undergo 5 years' imprisonment and on count 2, the Court having found that no substantial and compelling circumstances existed, he was sentenced to life imprisonment. He appeals now only against the sentence of life imprisonment, and does so with the leave of the Court a quo.

8. It will be convenient to deal first with the appeal of Cock.

9. Although there is no appeal against the sentence imposed upon the appellant on count 1 it is necessary to point out that the learned Acting Judge misdirected himself as to the prescribed minimum sentence applicable in respect of that count inasmuch as he was under the impression that such sentence was one of life imprisonment. He obviously overlooked the fact that the prescribed minimum sentence in terms of s 51(2) of the Act, as was indeed set out in the indictment, was in fact one of 15 years' imprisonment.

10. On count 2 the learned Judge found that no substantial and compelling circumstances existed such as would justify the imposition of a lesser sentence than life imprisonment and he duly imposed that sentence. He found that, as set out in the indictment, the prescribed minimum sentence of life imprisonment was applicable both on the basis that complainant was raped by more than one person acting in the execution or furtherance of a common purpose, as well as on the basis that grievous bodily harm was inflicted on the complainant during the course of the rape.

11. It will be convenient to deal firstly with the latter issue relating to the infliction of grievous bodily harm.

12. In this regard the learned Judge stated:

“She was raped in turn with a knife placed on her neck.”

And:

“The companion of the accused started raping her by requesting his colleague, that is the accused, to press her down with the knife on her neck. Thereafter they took turns. In the process her face had been covered. She was further kicked and assaulted.”

13. It must be remembered that the accused was convicted on the basis of his plea explanation which was accepted by the State. There was, quite simply, no admissible evidence before Dilizo AJ to the effect that a knife had been placed or pressed on complainant’s neck during the course of the rape or that grievous bodily harm had been inflicted upon her during the course thereof. It would appear that the learned Judge’s finding that she had been so assaulted was made with reference to the contents of a pre-sentence report. The contents of that report were at odds with the appellant’s plea explanation and Mr. Mgenge, who appeared for the State at the hearing of this appeal, conceded that the learned Judge had erred in placing reliance thereon. He conceded therefore that it had not been proved that grievous bodily harm had been inflicted upon the complainant during the course of the rape and that the learned Judge had erred in invoking the provisions of s 51(1) of the Act on this basis.

14. The only remaining issue therefore is whether the prescribed minimum sentence of life imprisonment is applicable on the basis that complainant was raped by more than one person acting in the execution or furtherance of a common purpose.

15. So-called gang rapes are, regrettably, an all too frequent occurrence in this Division and, judging from reports of cases emanating from other Divisions, throughout South Africa as well. In my experience it also

regrettably often happens that only one person accused of having been involved in a gang rape is apprehended and in due course convicted accordingly. It has, to the best of my knowledge, never been doubted that an accused convicted of having raped a complainant in such circumstances is liable to be sentenced to the mandatory minimum sentence of life imprisonment in terms of s 51(1) of the Act despite the fact that at the time of his trial none of the alleged co-perpetrators had yet been apprehended and convicted.

16. Such approach has, however, been held to be incorrect in the matter of S v Mahlase 2013 JDR 2714 (SCA).

17. For a proper understanding of this judgment it is necessary first to have regard to the proceedings in the Court a quo. See S v Mahlangu and Others unreported Venda Provincial Division case no CC46/03 dated 2003-11-20. Makgoba AJ, as he then was, convicted the appellant (who was charged as accused number six) of having raped the complainant together with another man who had, at the time of appellant's trial, absconded. The appellant's defence was an alibi. The evidence of the complainant that she was pushed into a Kombi motor vehicle and later raped by two men, does not, perhaps understandably given the nature of the defence, appear to have been contested.

18. Makgoba AJ set out the complainant's evidence as follows:

"The motor vehicle moved and while they were on their way complainant heard one of the attackers saying that 'I am asking for condoms' from Mr. Budeli and one or more of the attackers indicated that 'let's have sex with this woman.' They indeed unzipped her jeans and two of the attackers had sex with her. They proceeded with their journey until they stopped somewhere in the bush near a place called Solomondale where she was ordered to alight and she did alight and then she ran into the bush." (My emphasis)

19. Makgoba AJ accepted the complainant's evidence. In sentencing the accused he stated as follows:

“When I come to the rape incident, with regard to accused 6, no words can express the horror that woman, the victim, found herself in. How to humiliate a woman like that, raping a woman in a moving car in front of other people and the said rape being committed by more than one person.”

He found that the provisions of s 51(1) of the Act relating to the prescribed minimum sentence of life imprisonment in circumstances where the complainant was subjected to a gang-rape were therefore applicable. He accordingly sentenced the appellant to life imprisonment. Leave to appeal to the Supreme Court of Appeal against sentence only was granted.

20. In these circumstances the following sentence contained in paragraph 4 of the Supreme Court of Appeal judgment *supra* (per Tshiqi JA, Lewis and Theron JJA concurring) is, on the face of it, with respect, somewhat puzzling at first blush. It reads as follows:

“Whilst the motor vehicle was moving, Ms. DM was raped, apparently more than once, and allegedly by more than one of the assailants.”
(My emphasis.)

21. In paragraph 9 the reason for the learned Judge of Appeal's use of the words “*apparently*” and “*allegedly*” becomes clearer. There the following is stated:

“The second misdirection pertains to the sentence imposed for the rape conviction. The Court correctly bemoaned the fact that Ms. DM was apparently raped more than once and in front of her colleagues. The learned Judge however overlooked the fact that because accused 2 and 6, who were implicated by Mr. Mahlangu, were not before the trial court and had not yet been convicted of the rape, it cannot be held that

the rape fell within the provisions of Part 1 of Schedule 2 of the Criminal Law Amendment Act (where the victim is raped more than once) as the high court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside.”

22. A sentence of 15 years’ imprisonment was substituted for that of life imprisonment. I should mention that the reference in paragraph 9 to accused no 6 not being before the trial Court is incorrect. As appears from the judgment of Makgoba AJ appellant was in fact accused no 6. The charges against accused no 1, Mahlangu, were withdrawn as he became a State witness, and accused 2, 3, 5 and 7 were not before the Court. Accused no 4, who was charged together with the appellant, was not convicted of rape but of robbery and various counts of kidnapping.

23. Reverting to what is stated in paragraph 9, I have, with the greatest respect, considerable difficulty in understanding the basis upon which the conclusion was reached that the rape did not fall within the provisions of Part 1, Schedule 2 of the Act where the complainant had been raped more than once by more than one person.

24. Section 51(1) of the Act provides:

“(1) Notwithstanding any other law, but subject to subsections (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.”

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 –

(a) when committed –

- (i) *in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*
- (ii) *by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;”*

25. The complainant's evidence was accepted as being credible by Makgoba AJ whose findings in this regard were not challenged by the appellant on appeal, the appeal being only against sentence. The complainant's evidence did not, with respect, consist of mere '*allegations*' of an '*apparent*' gang rape. On the contrary, her evidence established beyond a reasonable doubt that she had indeed been raped more than once by two men, one of whom was the accused. Once that evidence was accepted, as it was by Makgoba AJ, then the fact that one of the men who raped her had not yet been apprehended and convicted of the rape appears to me, with respect, to be entirely irrelevant. The finding that the complainant was raped more than once by two men was a factual finding based on the evidence led at the trial. The accused was accordingly convicted of an offence referred to in Part 1 of Schedule 2 of the Act and the matter, on the face of it, therefore fell squarely within the provisions of s 51(1) of the Act.

26. A trial court is obliged to sentence an accused who appears before it on the basis of the facts which it found to have been proven when convicting the accused. The Mahlase dictum, however, gives rise, with respect, to the illogical situation that a trial court, having found beyond reasonable doubt that the complainant was raped more than once by two men and having convicted the accused accordingly, must, for purposes of the Act, disregard that finding and proceed to sentence the accused on the basis that it was not in fact proven that she was raped more than once; that the provisions of the Act relating to the imposition of the prescribed minimum sentence of life imprisonment are therefore not applicable; and that the minimum sentence applicable in terms of the Act is one of only ten years imprisonment.

27. I do not understand on what basis the credible and cogent evidence of the complainant that she was raped by two men, one of whom was identified as being the accused, should be disregarded, not only to the prejudice of the victim and of the State, but also, by way of contrast, to the benefit of the accused on the arbitrary basis that he happened to be the first of the gang to have been arrested and convicted.

28. This in itself gives rise to the anomalous situation that, whereas the first accused to be convicted and sentenced (the appellant Cock in this matter) is liable to a minimum prescribed sentence of only ten years imprisonment, any other accused who is thereafter convicted as having been part of the gang which raped the complainant, (the appellant Manuel in this matter) would be liable to the prescribed minimum sentence of life imprisonment, it now having been established in terms of Mahlase supra that complainant had indeed been raped more than once, by two men.

29. Mr. Mgenge submitted, however, that the present matters were distinguishable from that of Mahlase supra in that the appellant Cock had pleaded guilty to the gang rape. I do not agree. I can see no difference in principle, on an application of the Mahlase dictum, between a case where the conviction of the first accused to have been convicted and sentenced is based on credible evidence tendered by the State, and that where it is based on a plea of guilty by the accused. In both cases none of the other participants would have been apprehended and convicted.

30. Despite what I have said above, we are, however, bound by S v Mahlase supra.

31. In the light thereof it must follow that Dilizo AJ erred in finding that the provisions of the Act relating to the imposition of a compulsory minimum sentence of life imprisonment were applicable. Therefore it is necessary to set aside the appellant's sentence and to consider the question of sentence afresh.

32. The appellant is a 34 year old man who abandoned his schooling in grade 5. He was employed on a casual basis earning R450 per week. He has two previous convictions relating to the theft of livestock. Mr. Meyer, who appeared for the appellant at the hearing of this appeal, stressed in particular the fact that appellant had pleaded guilty, thus indicating his remorse. Furthermore, he had no previous convictions in respect of robbery or rape and, in particular, he had been under the influence of alcohol to a certain extent at the time of the commission of the offences.

33. Dilizo AJ considered all these factors. He dealt in particular with the issue of appellant's alleged state of intoxication. Appellant did not testify as to the effect upon him of his consumption of alcohol that night. As appears from his plea explanation set out above, all that he stated was that he had consumed "*strong liquor*", was "*drunk*", but that he "*still knew*" what he was doing and that it was wrong. In this regard Dilizo AJ referred to the Full Bench decision in this Court of S v Masimini CA179/88 in which it was stated, at page 6 thereof, that the fact that an accused person was to a substantial degree under the influence of liquor has generally been regarded as a mitigating factor. Dilizo AJ found, however, and correctly so with respect, that there was nothing in the present matter to indicate that appellant's state of intoxication was such as to reduce his capacity to appreciate fully the gravity of his actions. Compare S v Mqikela 2010 (2) SACR 589 (E) at 592d.

34. With regard to the submission that appellant, by pleading guilty, had shown remorse, Dilizo AJ correctly pointed out that appellant, in his interview with the probation officer, had deviated from the contents of his plea explanation, shifting the blame for the incident onto his friend Manuel and alleging that he had wanted to stop Manuel from assaulting the complainant but that he had been scared of him because Manuel was a gang member. As was pointed out by Dilizo AJ the appellant's protestations of remorse ring hollow in these circumstances. He referred to S v Matyityi 2011 (1) SACR 40 (SCA) where at para 13, Ponnann JA stated as follows:

“There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in Court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.”

35. This was an extremely serious case of rape. At the time of the commission of the offence the complainant was a 21 year old virgin. Her hymen was torn and there was bruising to her vaginal vault and cervix. It is also not in dispute that she was emotionally traumatised which led in turn to her failing Grade 10. She was, at the time of the trial, still subject to sudden outbursts of irrational anger; she was not eating properly and had lost weight; and she did not sleep properly at night. She was, fortunately, undergoing counselling.

36. The prescribed minimum sentence is one of 10 years’ imprisonment. Such a sentence, in the circumstances of this case, where the complainant was subjected to the utterly humiliating and terrifying ordeal of a gang rape would be wholly inappropriate. In the exercise of our common law jurisdiction, we are free to impose any sentence in excess of that minimum sentence. When we exercise this jurisdiction we are not bound by Mahlase *supra* and its interpretation of the Act. Mr. Meyer submitted that a sentence of 20 years imprisonment would be appropriate. I am of the view, however, having regard to all the circumstances, including the fact that the complainant was gang-raped, that the only appropriate sentence is that of life imprisonment.

37. I turn then to consider the appeal of Manuel against his sentence of life imprisonment.

38. In this matter there is no doubt that the provisions of the Act relating to the prescribed minimum sentence of life imprisonment are applicable inasmuch as appellant's accomplice, Cock, had already been convicted of raping the complainant.

39. The appellant in this matter is a 25 year old man with a grade 6 education. He was employed on a farm earning R1500,00 per month. He has two previous convictions. In November 2005 he was convicted of theft and sentenced to a wholly suspended fine. On 11 November 2010, very shortly before the commission of the rape in the present matter, he was convicted of attempted murder. Somewhat surprisingly, given the gravity of such an offence, he was sentenced to a wholly suspended term of imprisonment of two years.

40. He has a further conviction for assault, committed on 8 December 2010, but in respect of which he was only convicted on 24 January 2011. Although this is therefore not a previous conviction it is nevertheless, as Malusi AJ correctly remarked, an indication of the appellant's character, inasmuch as less than a month after having received the suspended sentence for attempted murder he committed an assault which was followed a mere 18 days later by the commission of the present grave offence.

41. In his case too it was submitted that he had shown remorse by pleading guilty. As remarked by Malusi AJ, the facts indicate otherwise. In this regard Malusi AJ stated as follows:

"His accomplice [Cock] was arrested after the commission of the offence, tried and sentenced during January 2013. He then at that stage implicated the accused who was arrested. Though initially accused pleaded guilty, he thereafter lied to the probation officer by alleging he was acting under duress of his co-accused which lie he

later retracted during his sentencing hearing in Court. The motive of the accused and his accomplice was purely financial and personal gratification.”

42. I am in no way persuaded by anything that Mr. Meyer has urged upon us that Malusi AJ erred in any way in finding a complete absence of any substantial and compelling circumstances such as would justify the imposition of a lesser sentence than life imprisonment.

43. The effect of this judgment in respect of the appellant Cock is that, although the original sentence imposed upon him has been set aside, there is in fact no amelioration of his sentence. For all practical purposes therefore his appeal fails.

44. Because a new sentence of life imprisonment has been imposed on him, it is necessary to order that this sentence be backdated to the date of imposition of his original sentence of life imprisonment, namely 17 January 2013

45. The appeals of both appellants are dismissed. The sentence of life imprisonment imposed on the appellant Cock is backdated to 17 January 2013.

J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

C. PLASKET
JUDGE OF THE HIGH COURT

I agree,

J. SMITH
JUDGE OF THE HIGH COURT

Appearing on behalf of both Appellants: Mr. J. Meyer
Instructed by: Legal Aid, South Africa

Appearing on behalf of both Respondents: Adv. Mgenge
Instructed by: Director of Public Prosecutions