IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: **A88/2023**

In the matter between:

MZWAKHE NGAVU APPELLANT

and

THE STATE RESPONDENT

CORAM: **MOLITSOANE, J et ZIETSMAN, AJ**

JUDGMENT BY: **MOLITSOANE; J**

HEARD ON: **06 NOVEMBER 2023**

DELIVERED ON: **09 NOVEMBER 2023**

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[1] The Appellant was arraigned in the Regional Court .

[2]

[3] ..

[4] on two counts of rape, two counts of kidnapping, and two counts of assault with intent to do grievous bodily harm. He was acquitted on the rape and kidnapping charges but convicted on both counts of assault with intent to do grievous bodily harm and sentenced to 5 years' imprisonment on the one count and 10 years' imprisonment on the other count. The court a quo ordered that the sentences should run concurrently. Aggrieved by the sentences he successfully petitioned the Judge President and this appeal is with his leave.

[5] The facts which led to the conviction are briefly as follows: -

1) At the time of these incidents, the complainant was 16 years old and in a love relationship with the appellant who was 20 years of age.

<u>The Assault of 04 February 2019 – 24 February 2019.</u>

2) The complainant's evidence is that she met the appellant in the street. The appellant requested her to accompany him to his home. She voluntarily went with him to his home. They had consensual sex. Later, two friends of the appellant arrived. The appellant and his friends then smoked dagga. She asked the appellant to take her home but he said he would take her after the two friends had left. After the friends had left, he refused to take her home. He instructed her to go to the bedroom. She refused and he pulled and started assaulting her by slapping her. He also assaulted her by beating her with a belt on her back and on her body.

3) The complainant thereafter spent about 2 weeks at the home of the appellant against her will.

5) On 25 February 2023, the complainant went to Tshepong Hospital where she was examined by a forensic nurse. The medical report compiled by the forensic nurse was accepted by agreement into evidence and it revealed that the complaint sustained the following injuries:

"abrasions 0.5 cm on the face and healing bruises on both eyes. 1.1 cm healed extension from the back and 5.5 extension

bruises on the left arm".

The Assault of 9 April- 2019

[3] The complainant testified that she was at her home when the appellant came and asked her to accompany him to his house. She agreed on condition that the appellant would not deny her to return to her home. They went to his parental home. The appellant locked the house after they had entered. He fetched an iron rod and assaulted her all over the body. According to the medical report admitted into evidence, she sustained extensive multiple bruises and abrasions on both arms; the eyes and thighs, head, and face were swollen. She apparently had a plaster on the left arm during examination. According to her, she was rescued by members of the community and police a few days later.

[5] The sentence imposed is assailed on the following grounds:

(a) That the sentence is shockingly inappropriate;

(b) That the court a quo over-emphasised the seriousness of the crime and the interests of the community over the personal circumstances of the Appellant;

(c) By finding that direct imprisonment was the only suitable sentence whereas the court a quo did not consider correctional supervision;

(d) The court a quo did not take the personal circumstances of the appellant into account.

[6] It is trite law that sentencing lies in the discretion of the trial court. In the absence of a material misdirection by the trial court, a court exercising appellate jurisdiction cannot approach the question of sentencing as if it were a trial court and substitute the trial court's sentence simply because it prefers its own. What the court has to consider is the triad consisting of the crime, the

offender, and the interests of society. Punishment should thus be individualised and fit the offender while blended with mercy.

[7] The personal circumstances of the accused were placed on record. In my view, the most important are the age of the appellant at the time of the commission of the offences as well as the time spent in custody while awaiting the finalization of this trial. Both he and the complainant were teenagers. He was 19 years of age while the complainant was 16 as indicated above. Ponnan JA in S v Matyityi[1] stressed that a person of 20 years or over had to show by acceptable evidence that he or she was immature to the extent that immaturity was a mitigation factor. It seems in my view the learned Judge in this case seems to suggest that the person below the age of 19 was considered immature. However, one has to bear in mind the remarks the court in this case made when it said:

" It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor unless it appears that the viciousness of his or her deeds rules out immaturity.[2]" (my emphasis)In my view, this factor, weighed together with other factors would greatly assist in weighing the possibility of rehabilitation of the appellant.

[7] The appellant, though not a first offender, had no relevant conviction. In his previous conviction, he paid an admission of guilt fine of R100 for possession of drugs. For the purpose of this case, he has the benefit of being sentenced like a first offender.

[8] The period the appellant spent in custody before his conviction is also a factor to be taken into account in deciding whether the sentence imposed is disproportionate or unjust. Turning to the interests of society, it demands that gender based violence be confronted with the seriousness it deserves and appropriate sentences are to be imposed for such offences. These types of

[1] 2011(1) SACR 40 para14.
[2] Matyityi(supra) at para 14- footnotes omitted.

crimes are prevalent in our society and rise exponentially on daily basis. Decisive action to curb them is thus necessary.

[9] While sentencing must be individualised and must fit the crime and the offender, the violence perpetrated by the appellant on a young child demand that a heavy sentence be imposed. This fact that the complainant was a young girl aggravates the sentence to be imposed.

[10] What is most disconcerting is the lack of remorse on the part of the appellant. Looking at his version, he acknowledges the assaults on the complainant. What he disputes is the reasons why he assaulted her. He seems to justify the assault on one or other grounds which does not raise any defence. In the first assault, he says he assaulted her because he overheard her saying to one Neo that he (the appellant) did not satisfy her sexually. In the second assault, the appellant says he assaulted her because she had apparently had sexual intercourse with his friend in another room which he was in a separate bedroom.

[10] Counsel for the appellant submits that the acknowledgment of the assaults must be seen as a sign of remorse and thus an indicator that the appellant is a candidate for rehabilitation. I do not agree that the appellant is remorseful. He pleaded not guilty as he is constitutionally entitled to. He went through a protracted trial without any aorta of defence. He rather chose to give excuses for his conduct which in his view justified him assaulting the complainant. Even if the trial court could have found that he assaulted the complainant under the circumstances he explained, that could hardly give him the justification to assault the complainant.

[12] The appellant was not convicted on charges which attract prescribed minimum sentences as envisaged in the Criminal Law Amendment Act 105 of 1997. In the first assault, the evidence reveals that the complaint was assault with open hands and a belt. No evidence was led as to the type of belt used. The medical

evidence accepted into evidence do not show that the injuries sustained were sever or of a permanent nature. It appears that the complainant only sustained abrasions and bruises. In our view, the sentence of 5 years' imprisonment in these circumstances is disproportionate to the crime committed and is thus unjust.

[3] The record reveals the abuse of the complainant by the appellant. It appears, however, that the complainant and the appellant were a bad combination who could not stay away from each other. The second assault was more sever. The weapon used was more dangerous than the belt used in the first assault. The appellant used an iron rod to assault the complainant. She sustained multiple injuries and also had a plaster on. She was so badly beaten that she was found lying on the floor. She spent two weeks in hospital. Much as the circumstances of this case demanded that the appellant be sentenced to an imprisonment term, in our view 10 years in prison is excessive and this demands our interference. I accordingly order as follows:

ORDER

1. The appeal against the sentence is upheld'
2. The sentences imposed by the court a quo are set aside and substituted with the following:
    i. Count 2 (Assault with intent to cause grievous bodily harm), the accused is sentenced to 6(six) months imprisonment;
    ii. Count 5 (Assault with intent to cause grievous bodily harm), the accused is sentenced to 5(five) years imprisonment;
    iii. In terms of s280(2) of the Criminal Procedure Act 51 of 1977, the sentence in count 5 shall run concurrently with the sentence in count 2;
    iv. The sentences in count 2 and 5 are ante-dated to 9 June 2022.

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P. E. MOLITSOANE, J

I agree

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PJJ ZIETSMAN, AJ

On behalf of the Appellant: Ms V.C Abrahams
Instructed by:
Legal Aid of South Africa
BLOEMFONTEIN

On behalf of the Respondent: Adv. S Giorgi
Instructed by:
The Deputy Director of Public Prosecutions
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