REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES

CASE NO.: A938/2015
4/5/2018

In the matter between:

NELSON GEORGE MASUNGA **Appellant**

and

THE STATE **Respondent**

Date heard: 15 March 2018

Date delivered:

JUDGMENT

STRIJDOM AJ:

[1] On 1 August 2013 the appellant was convicted in the Regional Court Benoni on one count of rape in terms of Section 3 of Act 32 of 2007 read with the provisions of section 51 and Schedule 2 of Act 105 of 1997.

[2] The appellant was subsequently sentenced to life imprisonment in terms

of section 51(1) of Act 105 of 1997. The court a quo ordered that the sentence be antedated to the date of arrest of the appellant to the 3rd December 2012

[3] In terms of section 50 of the Criminal Law Amendment Act 32 of 200 the appellants name was included in the National Register for sexual offenders.

[4] In terms of section 103(1) of Act 60 of 2000 no order was made and the appellant is *ex lege* unfit to possess a firearm.

[5] The appellant was legally represented at the trial.

[6] In terms of section 309 (l)(a) of the Criminal Procedure Act 51 of 1977 the appellant has an automatic right of appeal.

[7] The appellant noted his appeal against conviction and sentence.

Short summary of the evidence

[8] The evidence tendered by the State can be summarised as follows:

(8.1) Mrs L M testified that the complainant and her mother stay in a shack on her property. On 3 December 2012 the complainant's mother requested mrs N to keep watch over the complainant as she was going out. S Z, the complainant's younger brother was also present in the yard, playing with other children. The complainant was in the shack, and the door to the shack was open.

At some stage Mrs N noticed that the door to the shack was closed. She had knocked on the shack door, but did not get any response. The door was locked from the inside. She instructed S Z to call the elders. Mrs N returned to her house from where she noticed the appellant exiting the shack. The appellant left the door open and went to the toilet. When he exited the toilet he came to Mrs N and asked her where are the residents of the shack. The appellant left and returned with the mother of the complainant.

Everybody went into the shack of the complainant. Mrs N asked the appellant what he did in the shack. The appellant did not

respond. The complainant was found on the bed. She was not wearing panties and did not look happy.

(8.2) J M M acted as intermediary for the witness S V Z.

(8.3) S testified that on 3 December 2012 his mother was not at home. He testified that he remembers the day as that when the appellant was arrested. Mr Z testified that he went out of the shack to play and that he left the door open. The complainant was left in the shack watching television. She was seated in her wheelchair. He testified that the appellant was present at the yard, but left at one stage. He left alone.

At one stage Mr Z noticed the appellant was inside the shack, pulling up his zip and closing the burglar door of the shack. Mr Z was looking through a hole in the door that was also closed. He knocked and was unable to open the door. He could hear the complainant screaming and asking for help. Mr Z went to Mrs N and made a report to her. He thereafter went to inform his mother. The appellant emerged from the shack and went to the toilet. The appellant thereafter went to Mrs N.

(8.4) Doctor Winine Manyindi Motaung testified that she had assessed the complainant on 6 June 2013 and compiled a report in respect of the complainant. The complainant is wheelchair bound and disabled.

(8.5) Sister Kate Skosana testified that she had examined the victim on 2 December 2012. She did not have obvious physical injuries. The complainant was a virgin prior to the examination. The complainant had indicated to her that the appellant had not used a condom.

(8.6) Sergeant Gladys Masilela testified that she had charged the appellant on 4 December 2012. The appellant had made an exculpatory statement.

(8.7) Mrs S F Z testified that on 3 December 2013 the appellant arrived

at her shack at 8h00. They consumed liquor where after they both went to Mzumbe's Tavern. She lost track of the appellant at the Tavern. After 30 minutes S came to call her. He reported to her that the appellant had closed himself in the shack with the complainant. Mrs Z went home and found that the door to the shack was open and the appellant was standing next to a cupboard. The complainant was on the bed. When Mrs Z had left the shack, the complainant was in her wheelchair. The appellant denied that he had raped the complainant.

[9] The appellant testified in his own defence. He testified that he was at the house of the complainant on 3 December 2012. He accompanied Mrs Z to Mzumbe's Tavern. They left the Tavern together. Timothy was following them. He testified that Mrs Z fell behind and he reached the yard first. He went to the toilet. Mrs Z went to her shack. When he exited the toilet, Mrs N accused the appellant of raping the complainant. The appellant denied giving a statement to the Police. He further denied the contents of his warning statement.

[10] T M testified in the defence case. He testified that he was drinking with the appellant and Mrs Z at the Tavern on 3 December 2012. The appellant and Mrs Z left together, while he stayed behind in the Tavern. He later heard that the appellant was arrested.

[11] It was submitted by the counsel for the appellant that the trial court misdirected itself in not properly considering the fact that no male DNA was detected and that the appellant did not use a condom as testified by the complainant.

[12] The credibility findings by the court a quo were not contested by the appellant. The respondent supports the credibility findings of the court a quo.

[13] The court a quo came to the conclusion that the witnesses for the State did not contradict themselves or each other and accepted their evidence. The court was also convinced that the version given by the appellant can safely be rejected as false and that the State has proved its case beyond reasonable doubt.

The Principles applicable to appeal on fact

[14] The locus classicus is *R v Dlumayo and Another* 1948 (2) SA 677 (A) where the following principles which should guide an Appellate Court in an appeal purely upon fact were laid down in the judgment of Davis AJA.

(14.1) The trial judge has advantages which the appellate court cannot have in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

(14.2) Consequently the appellate court is very reluctant to upset the findings of the trial judge.

(14.3) The mere fact that the trial judge has not commented on the demeanour of the witness can hardly ever place the appeal court in as good position as he was.

(14.4) Where there has been no misdirection on fact by the trial judge the presumption is that his conclusion is correct, the appellate court will only reverse it where it is convinced that it is wrong.

(14.5) In such case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

(14.6) An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all embracing.

[15] The fact that the court a quo did not mentioned that no male DNA could be detected and that Sister Kate Skosana testified that the complainant had indicated to her that the appellant had not made use of a condom does not necessarily follow that because something has not been mentioned, therefore it has not been considered. See *S v Francis* 1991(1) SACR 198 (A).

[16] It is evident from the evidence and the physical injuries sustained by the complainant that she was raped both vaginally and anally. The complainant was

also assessed by a psychologist concluding that the complainant was a victim of sexual assault. Taking into consideration all the circumstantial evidence only one inference can be drawn that the appellant is the one who raped the complainant. It was decided in *Dweba v S 2004 (4) all SA 1 (SCA)* that:

"But it should be borne in mind that circumstantial evidence connecting the accused to the crime and inconsistencies in his evidence could have the effect that identification evidence-insufficient on its own to establish guilt beyond reasonable doubt-may harden into proof beyond reasonable doubt."

[17] I have no reason to doubt the magistrates appraisal of the evidence and therefore unable to find that the magistrate misdirected her on the facts.

The sentence

[18] The issues placed in dispute by the appellant can be enumerated as follows:

(18.1) The trial court misdirected itself in not finding substantial and compelling circumstances.

(18.2) The trial court misdirected itself in not considering the proportionality of the sentence.

(18.3) The trial court misdirected itself in not considering that some rape cases were less serious than others.

(18.4) The prospects of the appellants rehabilitation was not properly considered.

(18.5) The trial court misdirected itself in antedating the sentence to the date of appellants arrest.

[19] The personal circumstances of the appellant are as follows:

(19.1) He was 37 years old.

(19.2) He has three children 19, 15 and 11.

(19.3) He is single, but reside with the biological mother of his children.

(19.4) At the time of his arrest he was self-employed as an electrician and welder. (19.5) He earned an income of approximately R4 000 per month.

(19.6) He was held in custody since his arrest on 3 March 2012. (19.7) The biological mother of the children does piece jobs.

(19.8) He only completed standard 5 due to financial constraints in his family. (19.9) He is not a first offender.

(19.10) On the day of the incident he consumed liquor.

[20] The court a quo considered the following aggravating factors:

(20.1) The appellant abused the trust of the victim with her limited mental capacity and none existent physical capacity.

(20.2) The victim was raped vaginally and anally.

(20.3) The gravity and prevalence of the offence.

(20.4) The appellant displayed no remorse.

[21] In S *v Malgas* 2001(1) SACR 469 (SCA) the circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court were recapitulated where Marais AJ held:

> *"A court exercising appellate jurisdiction cannot in the absence of material misdirection by the trial court approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it. To do so would to usurp the sentencing discretion of the trial court.* "

[22] Further in Malgas at 470 d the court held that:

> *"The specified sentences are not to be departed from lightly and for flumsy reasons. Speculative hypothesis favourable to the offender undue sympathy, aversion to imprisoning first offenders personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of*

participation between co-offenders are to be excluded "

[23] In my view the magistrate did not overemphasize the interest of the community at the expense of the personal circumstances of the appellant. The magistrate considered all the mitigation and aggravating factors thoroughly.

[24] In my view the magistrate was justified not to deviate from the minimum prescribed sentence.

[25] The sentence imposed is not disproportionate to the crime the offender and the interest of society.

[26] Taking into consideration the gravity and heinous of the crime and the aggravating circumstances the nine months period that the appellant spent awaiting trial if taken cumulatively in consideration with his personal circumstances, cannot be compelling or substantial circumstances to deviate from the minimum sentence.

[27] The court a quo antedated the sentenced to 2 December 2012 being the date that the appellant was arrested. The Criminal Procedure Act 51 of 1977 do not empower the trial court to antedate a sentence it imposes. Section 282 of the Act only empowers the court of appeal or review to antedate a sentence and only to the date that the appellant was sentenced in the trial court.

[28] In the circumstance , I propose that the following order is made:

1. The appeal is dismissed on both the conviction and sentence.
2. In terms of section 282 of the Criminal Procedure Act 51 of 1977 the sentence is antedated to l August 2013.

J.J STRIJDOM

ACTING JUDGE OF THE GAUTENG DIVISION

OF THE IHIGH COURT OF SOUTH AFRICA

I agree,

N.V. KHUMALO

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

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