IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED.

CASE NUMBER: A427/16
20/2/2018

In the application of:

MBOI MISHACK KGOSANA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

INTRODUCTION:

[1] The Appellant was charged in the Regional Court held at Potchefstroom on the following charges:

[1.1] **AD COUNT 1:**

Housebreaking with intent to steal and theft;

[1.2] **AD COUNT 2:**

Contravention of section 5(2) of Act 32 of 2007, Sexual Assault.

[2] Ad count 1 it was alleged that the Appellant on/or about 3 April 2009, and at/or near [….] in the Regional Division of North West, unlawfully and intentionally broke into the house of C M with the intention to steal and then unlawfully stole the following items to wit:

[2.1] 2 x Motorola cell phones;

[2.2] 1 x Motorola charger, the property or in the lawful possession of C M.

[3] In count 2 it was alleged that on 3 April 2009, and at/or near [….] in the Regional Division of North West, the said Appellant unlawfully and intentionally inspired the belief in the complainant, to wit C M that the said complainant would be sexually violated by undressing all her clothes and also his clothes, by putting a condom on his penis and then forcing her down on the bed.

[4] The Appellant was duly convicted on 14 April 2010 on one (1) count of housebreaking with the intent to steal and theft, and one (1) count of sexual assault in contravention of section 5 of Act 32 of 2007 in the Regional Court in Fochville.

[5] The Appellant was sentenced to four (4) years imprisonment on count 1 and ten (10) years imprisonment on count 2. It was ordered that the sentence in count 1 should run concurrently with the sentence in count 2.

[6] The record had to be reconstructed. On appeal both counsel for the Appellant and Respondent concurred that the record was sufficiently reconstructed and that it would be in the interest of justice to conclude with this matter with the available record of the proceedings.

See: *S v Schoombie* 2017 JDR 0054 (CC)

[7] Leave to appeal was granted on petition on 21 April 2016, on both conviction and sentence.

AD CONVICTION:

[8] The evidence of the complainant C M was clear. She confirmed that on 4 April 2009 she was asleep in the house. She woke up and saw that there was a person standing next to her bed. It was the Appellant whom she later identified, who then grabbed her by the neck and undressed her. He demanded a condom, unzipped his trousers and put a condom on his penis.

[9] The complainant testified that she told the Appellant that she had such a fright that she needed to go to the bathroom. The Appellant indicated that he was looking for a longer knife, because the one in his possession was too short. The complainant used the opportunity to scream for help. The Appellant took her cell phone and charger and fled through the window. This property of the complainant was later recovered from the Appellant.

[10] On appeal the Appellant's counsel conceded correctly that the conviction was in order. He however made submissions with regard to the appropriateness of the ten (10) years term of imprisonment, which was imposed. It was argued that the sentence of ten (10) years imposed on the charge of sexual assault is shockingly harsh and inappropriate in the circumstances.

[11] Mr Van As argued that the prescribed minimum sentence for the rape of an adult person is ten (10) years imprisonment in terms of section 51(2) of Act 105 of 1977 for a first offender.

[11] It followed, so he argues, that because the Appellant was not convicted of rape but only for sexual assault, that the sentence appeared to be too severe, particularly because sexual assault is not a concluded act of rape. He argued that *in casu* a term of ten (10) years imprisonment for sexual assault is shockingly inappropriate.

[12] The Appellant's counsel also argued that the Appellant was arrested on 6 April 2009, and was not released on bail until his conviction and sentence on 14 April 2010. Accordingly the Appellant argues that although it was not reflected on the *J*15 record of the case that the Appellant spent one (1)

year in custody pending the outcome of his trial.

[13] It is argued that in line with the decision of **S *v Vilakatzi* 2012 (6) SA 353 SCA** that the period spent in custody should have taken a more prominent emphasis in considering whether the term of ten (10) years imprisonment is appropriate. Mr Van As argued that because there is no indication on record that the Court *a quo* considered this fact that the Appellant spent one (1) year in custody as an unsentenced detainee, that the Court on Appeal should take it into consideration for purposes of sentencing.

[14] The Appellant is not a first offender. The Appellant was previously convicted for robbery and attempted rape on 5 December 2004, and sentenced to an effective term of five (5) years imprisonment.

[15] I respectfully disagree with the submissions on behalf of the Appellant. The aggravating factors in my view far outweigh the mitigating features of the Appellant's case. The crimes committed by the Appellant are indeed very serious. The Appellant showed no remorse during the course of the proceedings.

[16] The fact that he had a previous conviction for robbery as well as a previous conviction for rape is indicative of the person of the Appellant and that he would not hesitate to resort to violence in committing these heinous crimes.

[17] The Appellant and the complainant knew each other. The Appellant also knew that the complainant stayed alone.

[18] I respectfully concur with the submissions raised on behalf of the Respondent that the complainant was therefore an easy target for the Appellant. He did not only invade the privacy of the complainant's house and harmed her sense of security, but also threatened her and clearly had the intention to rape the complainant was it not for her quick thinking.

[19] It should also be considered that the Appellant throttled the complainant on the way to the bathroom when she told the Appellant that she wanted to use the bathroom because of her fear.

[20] I respectfully concur with the counsel for the Respondent that the Appellant can deem himself lucky with the imposed sentence. It is an accepted principle that the seriousness of certain offences warrant that the sentencing principles of retribution and deference should receive priority over considerations of prevention and rehabilitation.

[21] I respectfully am of the view that the Court a *quo* was clearly correct in sentencing the Appellant to a lengthy term of imprisonment especially in the light of the fact that he has previous convictions of which violence is an element.

[22] The powers of a Court of Appeal is limited. A Court sitting as a Court of Appeal can only interfere with a sentence imposed by a lower Court if the Court on Appeal is satisfied that the lower Court did not exercise its discretion judicially.

[23] I have no reason to find that the learned Regional Court Magistrate did not exercise his sentencing discretion judicially. The Court of Appeal may only interfere with a Trial Court's decision when a Trial Court committed a serious misdirection, or if the sentence is so inappropriate that it could not have been imposed by a reasonable Court.

See: *S v Boggarts* 2013 (1) SACR 1 (CC) at para 41

***S v Rabie* 1975 (4) SA 855;**

S *v Giamoulis* 1975 (4) SA 867 (A);

S *v Pillay* 1977 (4) SA 531 (A).

[24] In the light of the above I would dismiss the appeal against both conviction and sentence.

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P PISTORIUS (ACTING JUDGE)

I concur B. Wanless AJ