IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No : A225/2017

In the matter between:

PULE SHADRACK MARUMO Appellant

and

THE STATE Respondent

HEARD ON: 11 DECEMBER 2017

CORAM: MATHEBULA, *Jet* MURRAY, AJ

DELIVERED ON: 8 MARCH 2018

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[1] This is an appeal against the Appellant's conviction of Rape in the Bloemfontein Regional Court on 29 August 2016 by Mr JHJ Greyvenstein and his sentence of 12 years' imprisonment imposed on 31 August 2016.

[2] The Appellant was a minor when the offence was committed and therefore has an automatic right of appeal in terms of s85 of the Child Justice Act 75 of

2008.

[3] With reference to his conviction the Appellant avers that the court *a quo* erred in finding that the State had proved its case beyond reasonable doubt; in rejecting the evidence of the Appellant; and in failing to find that the J88 does not support a finding that the complainant was raped twice.

[4] Regarding sentence the Appellant avers that the court *a quo* erred in imposing an excessive sentence which did not take cognisance of the Child Justice Act 75 of 2008; in over-emphasising the aggravating circumstances and, more specifically, in taking cognisance of the Appellant's previous convictions which were committed after the offence in this case; and in sentencing Appellant as a co-perpetrator because the Complainant was raped more than once.

[5] The Appellant was charged with Rape by contravening the provisions of s 3 read with s 1 of Act 32 of 2007, read with ss 256 and 261 of the Criminal Procedure Act 51 of 1977; and also read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. He pleaded not guilty and in his Plea Explanation admitted sexual intercourse on 16 August 2008 at the Complainant's house, but pleaded consent.

[6] Mr Reyneke acted for the Appellant and Adv Sekoena for the State.

[7] On the Complainant's version, the Appellant grew up in her neighbourhood but she did not know his name until after the rape. According to her they were drinking at the same tavern on the night in question. She admitted to having had two 750ml Reds and to being moderately under the influence when she was raped by the Appellant and by Sanu (or "Sonny" as she called the second perpetrator). She denied any consent to sexual intercourse.

[8] The Complainant testified that a group of them were driven home from the tavern in a bakkie at around 23:00. The women were dropped off at the Complainant's house from which she accompanied her now deceased friend, K, halfway to her house in the informal settlement. On her way back, she saw two males, the Appellant and Sanu, behind her, both holding broken beer bottle necks. They steered her towards a street with no lights and when she asked why they were no longer going towards her house, they started walking next to her with one on either side of her, still holding the broken bottle necks, and took her to a nearby culvert where she noticed cardboards on the ground.

[9] She was scared because she realised that she was going to be raped when the Appellant instructed her to undress, so she refused to do so. He then tore the button off her pants and pulled the pants and her panties off of her one leg. She could not scream because of the broken beer bottles in their hands. Both of the men then undressed, then first the Appellant, and then Sanu had sexual intercourse with her. They then told her to get dressed and leave. She only pulled up her panty and walked along, carrying the leg of her jeans because she was afraid of them.

[10] They walked with her to the same crossing where they had initially met. As she approached her home, her children heard her crying. She told both her daughter, S I, and her son-in-law, T M, that she had just been raped by both the Appellant and Sanu.

[11] T went after the two men while S stayed with her. Between 12:00 and 01:00 he returned with the Appellant and Sanu. In her house T asked the two of them what they had done to the Complainant. They admitted that they had raped her and said that they had made a mistake and asked her to forgive them. S, however, said the Complainant should not just let them go and gave her money the next morning to go to the police.

[12] At 06:00 in the morning the Complainant went to the police station to report the rape, leaving the men, including the Appellant, in the house where the police found them and arrested the Appellant. She was also taken to the hospital for an examination, the result of which was reported in the JBS and which supported her version.

[13] Contrary to what the Court *a quo* stated in his judgment, the JBS indicated that the Complainant suffered no injuries. The Form did indicate, though, that the findings were consistent with the history and time of the reported incident of the Complainant being raped "by two known men" and concluded that there was "a probability of sexual penetration". DNA evidence linked the Appellant to the case, and only he was before the Court a *quo* for the duration of the trial after Sanu could not be linked to the incident by DNA.

[14] The Court *a quo* correctly treated the Complainant's evidence with caution since she was a single witness. With reference to the principle stated in **S v**

Artman and Another[1] , namely that all that is required for the evidence of a single witness to be accepted is that such evidence should be clear and satisfactory in all material respects, the Court *a quo* cautioned that in assessing such evidence caution must not oust common sense.

[15] I cannot find any misdirection in the Court *a quo's* finding that the Complainant made a fair impression even though her evidence was not perfect, especially in view of the seven years which had passed before she testified about the incident, and which could account for some of the inconsistencies. Nor in the Court *a quo's* acceptance of the Complainant's version that there had been had been no relationship between her and the Appellant when he raped her and that no bias against the Appellant could be detected in her evidence.

[16] Support for her version was found in the J88 Form which made reference to the Complainant having been raped by two men, as well as in the DNA-link to the Appellant. Furthermore, the fact that the Complainant was crying and still angry when she had the medical examination the next day and that she did immediately after the incident report the rape to the first two people that she met when she got away from the Appellant, namely her daughter and her son-in-law, rebuts any suspicion that she might have fabricated the allegation of rape as the Appellant averred.

[17] The Appellant's version, on the other hand, in his s 115 plea explanation, was that consensual sexual intercourse took place at the Complainant's house. The Court *a quo* pointed out numerous contradictions between the version which the Appellant's first representative put to the Complainant and the dramatically different version which the Appellant created when he testified under oath.

[18] The Court *a quo* highlighted three examples "which put his evidence in a very negative light": first of all, that it was put to the Complainant on the Appellant's behalf that consensual sexual intercourse took place at the Complainant's house; thereafter that the Appellant averred in his testimony that he took the Complainant to his parents' house where they had consensual sexual intercourse; then that he alleged that they had done so on several previous occasions, an allegation that was never put to the Complainant when she was

[1] 1968 (3) SA 339 (A)

testifying, and, as the prosecutor said, one that had in all the years since the incident never been made.

[19] The Court *a quo* then found the evidence against the Appellant to have been proved beyond a reasonable doubt. The Court was satisfied, "in light of the totality of the evidence" that the Appellant had indeed raped the complainant and accordingly found him guilty.

[20] It is trite law that a Court of Appeal may not depart from the Trial Court's findings of fact and credibility, unless they are vitiated by irregularity, or are patently wrong.[2] Mr Reyneke on behalf of the Appellant submitted that the court *a quo's* finding that the type of rape the Appellant is guilty of, falls within the ambit of section 51(1) of Act 105 of 1997 read with Part 1 of Schedule 2, i.e. being raped by a group of persons acting in furtherance of a common purpose, amounts to a misdirection. He pointed out that none of the Appellant's co-assailants were charged with or convicted of the rape, wherefore such a conviction amounts to a misdirection.

[21] In **Mahlase v The State[3],** the Court in a similar situation held that: "

> .... [9] The second misdirection pertained to the sentence imposed for the rape conviction. The Court correctly bemoaned the fact that Ms D M 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 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] The Supreme Court of Appeal in **Ndlovu v S[4]** held that such an error does not result in a failure of justice, even when, as in that case, the appellant had been charged with rape read with S 51(2) and Part 1 of Schedule 2 and was found guilty of rape as set out in S 51(1) for which life imprisonment was the relevant

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[2] S v Francis 1991 (1) SACR 198 {A) at 198 J - 199 A; S v Hadebe and Others 1997 (2) SACR 641 {SCA) at 645 E F

[3] (255/2013)[2011J ZASCA 191 (29 May 2013)

sentence, as long as the appellant had been warned of the possible application of the minimum sentence legislation.

[23] I agree with Mr Reyneke's submission that the conviction of rape is in order, but that the Appellant should have been convicted of Rape as contemplated in Section 51(2), read with Part 3 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, which would have a direct bearing on the 12-year sentence which the Court *a quo* imposed on the Appellant, since s 51 (2) carries a minimum sentence of 10 years' imprisonment for a first offender, and not life imprisonment likes 51(1).

[24] In **LT v S**[5] the Court held that s 51 (6) of the Criminal Law Amendment Act 105 of 1997 provides that the provisions of s 51 do not apply in respect of an accused person who was under the age of 18 at the time of commission of the offence.

Ad sentence:

[25] As stated in **S v Rabie**[6] this Court needs to keep in mind that punishment is pre-eminently a matter for the discretion of the Court *a quo* and that the Court of Appeal should be careful not to erode that discretion. It is trite law that a Court of Appeal will interfere with a sentence only if it is of the opinion that such sentence is unreasonable or unjust or vitiated by irregularity or if the Trial Court misdirected itself **(S v Jimenez**[7] and **S v De Jager and Another**[8]**)** or if it is so markedly disproportionate that it could be described as "shocking, startling or disturbingly inappropriate", as held in **S v Malgas**[9]**.**

[26] Unfortunately the Court *a quo* does not explain how it arrived at the 12-year sentence. Mr Reyneke, in critising the way in which the Court *a quo* imposed the 12-year sentence on the Appellant, referred to **S v Siebert**[10] in which the Court held that:

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[4] (204/2014) [2014] ZASCAA 149 (26 September 2014)
[5] [2017] JOL 38711 (ECG)
[6] 1975 (4) SA 855 (A)
[7] 2003 (1) SACR 507 (SCA) at 517 g-h
[8] 1965 (2) SACR 616 (A) at 629
[9] 2001 (1) SACR 469 at 478f-g
[10] 1998 (1) SACR 554 (A) at 558 i-559a

> "Sentencing is a judicial function *sui generis.* It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the Court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the Court."

[27] It is trite law that the sentence of an offender must be balanced between the interests of society, the offence and the personal circumstances of the Accused.[11] In the present case the youthfulness of the Appellant when he committed the offence, i.e. 17 years and 8 months, had to be a factor which would weigh very heavily in considering an appropriate sentence.

[28] In view of the Court *a quo's* misdirection in classifying the rape as falling under Part 1 of Schedule 2 which carries a minimum sentence of life imprisonment instead of under Part 3 of Schedule 2 which carries a minimum sentence of 1O years' imprisonment for a first offender, the 12-year sentence that was imposed on the Appellant is inappropriate and because of the lack of explanation for imposing it, this Court is entitled to interfere. As stated in **Mudau v S[12]** regarding the disparity between two related sentences: "Absent of such explanation for the disparity, a sentence appears to be ill-considered and arbitrary."

[29] The Court *a quo* did not impose the sentence in terms of Act 105 of 1997, but in terms of s 276(1)(b) of the Criminal Procedure Act 51 of 1997. It did take into consideration as mitigating such circumstances as that the Appellant was "relatively youthful" during the commission of the crime and that liquor surely played a role. As aggravating factors the Court *a quo* listed the seriousness of the offence, namely that the Appellant raped the Complainant who was almost twice his age, that he was acquainted with the Complainant, that when she was at her most vulnerable the Appellant and his friend attacked her with broken bottle necks in hand, taking advantage of her in a culvert. The Court explicitly stated that he was not taking into account the Appellant's

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[11] S v Banda and Others 1991 (2) SA 352 (BGD) at 355 A
[12] (419/12) [2011J ZASCA 191 (30November 2012)

other convictions and that there was consensus between the State and the Defence that Act 105 of 1997 need not be applied because the Appellant was a minor at time of the offence and that both asked for a lesser sentence.

[30] In my view "Relatively youthful" was not the appropriate criterion to be applied here. The Appellant was still a minor and the principles governing sentencing in the Child Justice Act, 75 of 2008, should have been paramount in selecting an appropriate sentence.

[31] The Defence attorney asked for a sentence of 5 years, while the State submitted that the Regional Court's jurisdiction in terms of s 276(1)(b) was a maximum of 15 years and asked for a sentence of 15 years to be imposed. It is not clear how the Court *a quo* then arrived at 12 years. As Mr Reyneke pointed out, although the Court *a quo* did state that the Appellant was a minor, it never referred to Schedule 3 and Section 77 of the Child Justice Act 75 of 2008. One does not know whether the Court *a quo* started off from 15 years and in consideration of the Appellant's age, imposed 12 years, or whether the Court started from 10 years and in view of the aggravating circumstances increased the sentence to 12 years.

[32] In **S v Matyityi[13] ,** for instance, the Court held that

> "someone under the age of 18 years is to be regarded as naturally immature."

[33] In **LT v S[14]** the Court therefore held that youthfulness, peer pressure and impulsive error of judgment are necessary and important considerations which should be taken into account by the sentencing court. One can therefore assume that the Appellant's immaturity and susceptibility to being influenced by his peers must have influenced his blameworthiness, which in turn can operate as a mitigating factor. But, one simply does not know whether those factors were indeed weighed up when a decision regarding the 12-year sentence was made. (See also: **S v Ndzola and Another[15])**

[34] It has regularly been emphasised by courts that children should be

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[13] 2011 (1) SACR 40 (SCA)
[14] *Supra,* at 14

sentenced to imprisonment only as a last resort. In **S v Jackson and Others**[16] on appeal the Court reduced the appellant's sentence and stated that:

> "It happens not infrequently that young children, when involved in a crime, act with a degree of bravado to impress their peers..."

[35] And in **S v N**[17] Cameron JA in reducing the 17-year old Appellant's sentence for rape took into account that the crime was unplanned and seemed to "have stemmed from a terrible, but impulsive, error of judgment" and that the impulsivity was connected to his youth, and that, having regard to s 28(3) of the Bill of Rights, he was, constitutionally speaking, a child at the time of the rape.

[36] Sections 69(1)(c), (d), and {e) of the Child Justice Act 7 5 of 1979 state one of the objectives of sentences for juveniles to be to use imprisonment only as a measure of last resort and only for the shortest appropriate period of time. The overall aim with a sentence should be to ensure that the necessary supervision, guidance, treatment or services assist the child to understand the implications and be responsible for the harm caused, and to promote the reintegration of the child into the family and community.

[37] Of course that does not mean that in suitable circumstances such a juvenile should not spend any time in prison at all. In *S v N, supra,* Cameron JA already followed a restorative justice approach, even before the advent of the Child Justice Act, by imposing a sentence of five years' imprisonment in terms of s 276(1)(i) of Act 51 of 1977 to enable the appellant to be released into correctional supervision at an earlier stage, stating that:

> "Given available statistics on rape, a sentence involving imprisonment was necessary despite the impulsivity of the crime and the young age of the appellant ... A prison sentence is therefore unavoidable. But what sort of prison sentence ...[18] Child offenders ... must be distinguished from adults because the crimes of children 'may stem from immature judgment, from as

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[15] 2016 (1) SACR 320 (WCC)
[16] 2008 (2) SACR 274 (C) at [40]
[17] 2008 (2) SACR 135 (SCA)at [37] and [38]
[18] S v Jackson, *supra,* at [42]

yet unformed character, from youthful vulnerability to error and impulse'"[19]

[38] The Child Justice Act 75 of 2008 came into operation on 1 April 2010. S 68 of Chapter 10 thereof provides as follows:

> "A child justice court must, after convicting a child, impose a sentence in accordance with the provisions of this chapter".

[39] In **S v RS and Others**[20] the provisions of s 68 were held to be peremptory. S 77 of Act 75 of 2008 deals with Sentences of Imprisonment for juveniles and provides that:

> "(5) A child justice court imposing a sentence of imprisonment must antedate the term of imprisonment by the number of days that the child has spent in prison ... prior to the sentence being imposed."

[40] The Court a *quo* should therefore have imposed a sentence which accorded with s 77 of and provided for the aims of Act 75 of 2008, but, as Mr Reyneke pointed out, that section was never even mentioned, which is probably the reason for the disproportionate sentence.

[41] Mr Reyneke did not request that the Appellant be allowed to go unpunished for the rape of the Complainant, but submitted that in view of the aggravating circumstances in the case a sentence of six years would be appropriate.

[42] In doing so, he relied on **Itani Thomas Mudau v The State**[21] in which the court held that:

> "It is generally accepted that inordinately long terms of imprisonment do not contribute to the reform of an accused person. On the contrary they have the negative effect of denuding the accused of all hope of rehabilitation."

and on **S v Skenjana**[22] in which it was stated that:

> 'Wrongdoers must not be visited with punishments to the point of being broken."

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[19] S v Jackson, *supra,* at [45]
[20] 2012 (2) SACR 160 (WCC) at [25]
[21] (419/12) (2011] ZASCA 191 at [5]
[22] 1985 (3) SA 51 (A) at 55c-d

[43] This is especially apposite in the present case in which the Appellant was a minor when he perpetrated the rape. For in **S v Phulwane and Others**[23] it was stated that every judicial officer who has to sentence a youthful offender must ensure that such sentence will promote the rehabilitation of that particular youth and has, as its priority, the reintegration of the youthful offender back into her or his family and community, all of which are in accordance with the aims of the Child Justice Act. (See also: **S v B**[24]**)**

[44] In my view in the circumstances of this case a period of 12 years' imprisonment is inappropriate and unjust since the Appellant was a minor when the offence was committed. I agree with Mr Reyneke that a sentence of 6 years' imprisonment would serve the purpose of retribution but also afford the Appellant an opportunity to be rehabilitated and to be reintegrated into society. It would strike an appropriate balance between the seriousness of the crime, the interests of the victim and society, as well as the constitutional protection of young offenders below 18 years of age in terms of s 28(1)(g) and 28(2) of the Constitution. It would also promote the best interests of the minor, in accordance with the aims of the Child Justice Act by instructing that the minor be detained for the shortest appropriate time.

[45] It was conceded by the State that such sentence would be acceptable.

[46] Having regard to all the relevant factors on sentence I am satisfied that the following sentence is more reasonable, balanced and justifiable in respect of the Appellant: a term of imprisonment of 6· years, antedated to the date of sentence in the Court *a quo.*

WHEREFORE the following order is made:

1. The appeal against the conviction is dismissed and the appeal against the sentence is upheld.

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[23] 2003 (1) SACR 631 (T); See also: Du Toit Commentary on the Criminal Procedure Act, Looseleaf Service 50, 2013 at 28 - 18M

2. The conviction is confirmed.
3. The sentence of 12 years' imprisonment is set aside and substituted with the following sentence:

"The Appellant is sentenced to 6 (SIX) years' imprisonment, which term of imprisonment is to be antedated to 31 August 2016."

H MURRAY AJ

I concur and it is so ordered.

MATHEBULA J

On behalf of the Appellant:	Mr J D Reyneke Attorney for the Appellant Bloemfontein Justice Centre Legal Aid South Africa 1st Floor- Southern Life Building 41 Charlotte Maxeke Street BLOEMFONTEIN
On behalf of the Respondent:	Adv M G Sekoena Office of the Director of Public Prosecutions : Free State BLOEMFONTEIN

[24] 2006 (1) SACR 311 (SCA) at [20]