REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

2/3/2018

DATE SIGNATURE

CASE NO: A331/16

In the matter between:

NKOSI KHALEWAYO DAVID

and

THE STATE

JUDGMENT

MTATI AJ:

Introduction

[1] Appellant was convicted and sentenced in the Regional Division of Gauteng, held at Nigel, on five counts ranging from robbery, kidnaping and rape. It is apposite at this stage to mention all the charges as these become relevant further in this judgment. The charges against Appellant were:

(a) Count 1: Robbery, read with the provisions of section 51(2) of the Criminal Law Amendment Act 108 of 1997;

(b) Count 2: Kidnapping;

(c) Count 3: Rape, read with the provisions of section 51 (2) of the Criminal Law Amendment Act 51 of 1997;

(d) Count 4: Rape, read with the provisions of section 51 (2) of the Criminal Law Amendment Act 51 of 1997; and,

(e) Count 5: Kidnapping.

[2] The Appellant pleaded not guilty to all the charges but was later convicted and sentenced to 5 years on count 1, 5 years on count 2, life imprisonment on count 3; life imprisonment on count 4, and 5 years on count 5.

[3] This is an appeal against both conviction and sentence with the leave of the trial Court.

Background

[4] The charges levelled against Appellant relate to two incidents that took place over a span of approximately nine months. The one category of charges relate to incidents that took place on or about 31 May 2013 and the second group of charges took place on 6 March 2014. For reasons unknown to me, the State decided to construct the charges beginning with the latest incidents which took place on 6 March 2014. In order to avoid misunderstanding, I will also refer to the charges as crafted by the State.

Incident relating to 6 March 2014 (charges 1 to 3)

[5] The evidence before the trial Court was that the complainant was coming from Jabula supermarket where she bought some food and cigarettes. The Appellant and another gentleman approached the complainant, Appellant slapped her with an open hand on her face and ordered her to go into the bushes which were nearby. Whilst in the bushes the Appellant and his accomplice produced knives and ordered the complainant to take off her clothes whereafter she was raped by the accomplice first and thereafter by the Appellant. The complainant remembered that Appellant even mentioned that he does not need to make use of a condom.

[6] After the rape incident, complainant was then tied up and her underwear was forced into her mouth to stop her from screaming. The Appellant and his accomplice left the scene taking with them the groceries of the complainant, her cellphone and some money. Complainant was able to untie herself. She went to a nearby dwelling belonging to one Delly who then summoned the police and gave her clothes to cover herself as her clothes were torn apart.

[7] During cross-examination it came to the fore that the complainant does not drink alcohol and that she only smokes cigarettes. On the suggestion that Appellant will testify that complainant is a prostitute, she strongly denied this and further testified that she is permanently employed at Parking Sand and Bricks. Delly was called to testify and she substantially confirmed the evidence of the complainant and was not cross-examined.

Incident relating to 31 May 2013 (charges 4 and 5)

[8] The evidence relating to the two counts against Appellant is that complainant was in the company of two ladies at Roy tavern. Whilst they were drinking alcohol, two men started fighting until the owner of the tavern chased them out. At that very moment the Appellant grabbed the complainant and hit her with an empty bottle on her head demanding that they should leave.

[9] Appellant testified that she did not want to leave but was grabbed and pulled by the Appellant who again clapped her with an open hand on her face and also pulled out a knife threatening to stab her. They proceeded to

the Appellant's mother's house where Appellant switched on the television set and demanded that complainant takes off her clothes. Upon her refusal, Appellant undressed complainant himself and raped her.

[10] After the rape Appellant went outside to the toilet the complainant locked herself inside the room and immediately called for the assistance of the police. Under cross-examination it is placed in dispute on who called the police but it is common cause that they arrived the morning. Appellant came back and first started by breaking the window demanding that the door be opened and thereafter proceeded to the door and kicked it open.

[11] Appellant was furious and assaulted complainant for calling the police and he bit complainant on her finger. Appellant was also bitten on his cheek by complainant. Appellant threw complainant again on the bed and raped her again. A third rape incident took place again in the morning.

[12] The police arrived in the morning and demanded that both Appellant and complainant put on their clothes and at this stage Appellant proceeded outside, jumped over the wall fence and ran away. Appellant was seen later by another police officer who was on patrol and upon being confronted, Appellant ran away again and was ultimately arrested hiding underneath a bed at a stranger's house.

[13] The Appellant's version largely corroborates that of the complainant except that he testified that he had a secret love relationship with complainant and that the sexual intercourse was consensual. The love relationship was kept secret since Appellant has a child with another lady known to complainant. This evidence was disputed by the complainant.

Analysis of evidence

[14] Before the analysis of evidence by both the State and Appellant, it was argued on behalf of appellant that count 3 was not properly detailed and as such Appellant suffered prejudice by not being properly informed that he is facing a possible sentence of life imprisonment upon conviction. Counsel for Appellant made a comparison between count 3 and count 4 specifically identifying the specific mention of life imprisonment in count 4 whereas the same was not done in count 3.

[15] The argument made on behalf of Appellant is not that Appellant was properly charged with rape in terms of section 3 of Criminal Law Amendment Act 32 of 2007 read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 but rather that the charge did not specifically mention life imprisonment as a possible sanction upon conviction. Count 4 is drafted in similar fashion as charge 3 the only exception being an inclusion of the following: "*Penalty: Life imprisonment*". On that basis it is argued on behalf of Appellant that the charge sheet did not indicate on what basis the provisions of section 51(1) of the Act are applicable.

[16] I do not agree with this argument. Section 35(3) of the Constitution Act 108 of 1996 provides: *"Every accused person has a right to a fair trial, which includes the right- (a) to be informed of the charge with sufficient detail to answer it; ..."* In my view there was no

uncertainty on the allegations levelled against the Appellant on this charge. In any case, the evidence of the complainant and her witnesses was tendered and Appellant, through his representative had an opportunity to fully cross-examine the witnesses. Section 88 of the Criminal Procedure Act[1] provides:

> *"Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred."* I do not find anything on this charge that appears defective and it is my submission that even if there was any defect, this was cured by evidence.

[17] Appellant denies that he committed any offence in respect of counts 1 to 3. In fact, he testified that the complainant on these counts is not known to him. He further testified that in the event of his DNA samples found on the complainant, this was as a result of him frequenting the vicinity of Jabula supermarket to source services of prostitutes. He, however, does not remember his whereabouts on 6 March 2014.

[18] It is not the case of Appellant that he is wrongly identified but that if his DNA sample was found present on the complainant, then he would have paid for sexual favours to her.

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[1] Act 51 of 1977

[19] The question is whether the version of Appellant is reasonably possibly true and if that were to be the case then the matter should be decided on the acceptance of that version. In the matter of ***S v Shackell***[2], Brand AJA noted the following:

> *'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step.'*

[2] 2001 (4) SA 1 (SCA) para 30

[20] In determining whether the version of Appellant is reasonably possibly true, the correct method of approaching the evidence as a whole was stated in the case of ***S v Chabalala*** [3] where Heher AJA remarked:

> *"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case of either party...was decisive but that can only be an ex post facto determination and a trial court should avoid the temptation to latch on to one obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."*

[21] The complainant testified that she had a clear view of the Appellant. She remembered that he stated that he will not make use of a condom. Upon being presented with a photo album, she clearly mentioned that the sketches were not clearly indicative of the Appellant.

[22] The complainant also testified that she does not know the accused and had no reason to falsely incriminate him. If the Court were to accept the version of the Appellant that complainant was a prostitute hence his DNA was found on her, the question still remains, why then would her clothes be torn and still run to the nearest house to ask for help. The complainant

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[3] 2003 (1) SACR 134 at 139 [15] I

asked for help soon after the rape incident and an independent witness confirmed her version. As indicated above, the testimony of Delly was accepted without any cross-examination. The honesty of the version of the complainant is not placed in dispute.

[23] It is also not in dispute that soon after the report was made to Delly the police were called and the complainant was taken to the police station and immediately thereafter to the hospital were tissue samples were taken. The DNA samples taken from the complainant are confirmed the identity of the Appellant.

[24] In respect of counts 4 and 5 it is the version of Appellant that there was a secret relationship between him and the complainant and the secrecy was occasioned by Appellant having another relationship with another woman known to the complainant out of which a child was born.

[25] Appellant testified that a fight ensued between him and the complainant and according to him, complainant wanted to go back to the tavern. It is not clear why was complainant stopped from leaving if she wanted to do so. Appellant can also not explain why he was locked outside the house soon after he went to the toilet. It is really a strange kind of a relationship that leads to both Appellant and complainant biting each other.

[26] What is further strange for the Court is the fact that Appellant ran away from the scene when the police arrived. All that constable Nkosi asked was what happened and directed both Appellant and complainant to put on their clothes. It is at this stage that Appellant climbed over the wall and ran away. At a second incident, another police officer, constable Tshabalala, was stopped by a member of the community who informed him about the

whereabouts of Appellant and that he is wanted on a charge of rape. Appellant, upon being confronted, ran away again. Appellant was chased and back up had to be called where he was then later arrested under a bed in a certain house.

[27] The version of Appellant and the surrounding circumstances of what exactly took place are not of a person whose version is reasonable possibly true. I dismiss the version of Appellant as false on all counts. The Court finds that Appellant indeed made himself guilty of all offences preferred against him on counts 1 to 5.

Sentence

[28] It is trite law that sentencing falls within the discretion of the trial court and it is only in instances of a *misdirection* that this discretion can be tempered with. *(my emphasis)*

In ***S v Pillay***[4], Trollip JA remarked:

> *"Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing sentence it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the*

[4] 1977 (4) SA 531 (A) at 535 E - F

sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[29] In ***S v Khumalo***[5] Holmes JA remarked as follows:

> *"Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances".*

[30] Three of the charges levelled against the Appellant are governed by Act 105 of 1997 (Minimum Sentences Act). This Act prescribes certain minimum sentences for certain offences. The Court can however deviate from the set minimum sentences if the Appellant can demonstrate that there exists substantial and compelling circumstances to justify imposition of a sentence less than the prescribed minimum.

[31] In determining the existence of 'substantial and compelling circumstances' the Court had the following to say in the case of ***S v Malgas***[6]:

> *"Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as*

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[5] 1973 (3) SA 697 A at 698.
[6] 2001 (1) SACR 469 at 477.

substantial compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante Omnia as it were, any or all of the many factors traditionally and rightly taken into account by the courts when sentencing offenders"

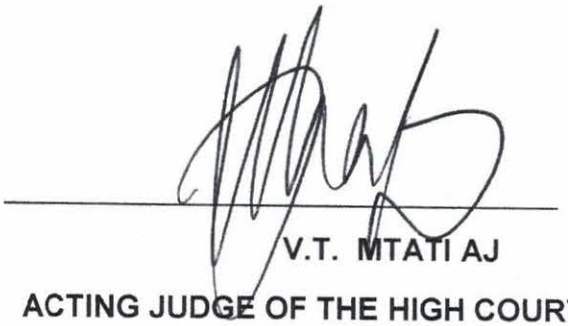
[32] The legal representative of Appellant did not address the trial Court of the presence or otherwise of the substantial and compelling circumstances. The following personal circumstances were placed before the trial Court, namely, that Appellant was 26 years of age; he is single; he has one daughter aged 7 years; that the daughter resides with her biological mother; that Appellant was self-employed earning between R180 and R200 per day; and that Appellant has passed grade 9 at school.

[33] Having considered all the circumstances, it is proposed that the appeal be dismissed.

Order

In the result, I would propose the following order:

The Appeal on both conviction and sentence is dismissed.



V.T. MTATI AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

T. MAUMELA J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON 30 JANUARY 2018

JUDGMENT DATE

FOR THE APPELLANT: ADV F VAN AS

INSTRUCTED BY: LEGAL AID SOUTH AFRICA

FOR THE RESPONDENT: ADV MOLATUDI

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS