IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISON, PRETORIA)

CASE NO.: A238/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

28 December 2022

SIGNATURE DATE

In the matter between:

PETRUS MOGALEBANE **APPELLANT**

and

THE STATE **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 28 December 2022.

JUDGMENT

N V KHUMALO J (with MFENYANA AJ concurring)

Introduction

[1] The Appellant, was on 9 March 2021 convicted by the Regional Court, Tsakane, Gauteng (court a quo) on charges of a rape within the ambit of s 51 (1) read with Part 1 of Schedule 2 of the Criminal Procedure Amendment Act 105 of 1997 ("Amendment Act") and robbery with aggravating circumstances for which he was on 21 May 2021 sentenced to life and 15 years imprisonment, respectively. The sentences were to run concurrently. He is appealing both the conviction and sentence exercising his automatic right to appeal occasioned by the sentence of life imprisonment.

[2] The Appellant was in the court a quo legally represented.

[3] The salient facts are that the Complainant was assaulted and raped by a couple of men in a minibus taxi (taxi) she boarded on 8 January 2019. The Appellant was identified through DNA to have been one of the assailants. The men also assaulted and robbed the Complainant of her belongings including two cellphones. During the trial the Appellant did not dispute having sexual intercourse with the Complainant but alleged to have been compelled to do so by the other perpetrators. The court found that the State proved the Appellant's guilt beyond reasonable doubt based on the evidence of the Complainant who refuted that anyone of the perpetrators was compelled to rape her and that the Appellant's version could not be reasonably possible true.

[4] The issue that arises in this appeal is whether the court *a quo* misdirected itself in its finding that the version of the Appellant could not be reasonably possible true and if the sentence imposed was in the circumstances of the case excessively severe, the court having misdirected itself in finding that there were no substantial and compelling circumstances.

Evidence led

[5] The Complainant's version was that on the day of the incident she boarded a taxi to Tsakane which already had six (6) men passengers, sitting on different rows. She sat on the seat on the row behind the driver which was already occupied by one of the men. Another man was sitting in the front passenger seat next to the driver. Three other men were sitting at the back seat rows behind her. One of the man from the back seat dragged her to the back and strangled her. The man sitting next to her grabbed her bag and threw the contents on the floor. She was thrown and made to lie down on the floor. Another man threatened her with a knife, lifted her dress and moved the knife up her thighs. The man took off the Complainant's underwear. She was then raped by two of the men whilst being assaulted at the same time. She could not clearly capture the perpetrators' faces during the rape because her head was kept under the seat but heard the men talking in isiZulu a language she understood very well. They insulted her and threatened to shoot her. The first man to rape her was still at it when he was pushed off by a second one who penetrated her as well. A third man then put his penis in her mouth and forced her to give him a blow job. She disputed that any of them was forced and instead reiterated that the two men who raped her vaginally were actually fighting each other to penetrate her. She further stated that none of them at any given time tried to get out of the taxi. She was raped whilst the taxi was moving. The incident was traumatic and affected her badly especially at school.

[6] The men also demanded the Complainant's pin code to her cellphone and her bank application which she gave them. She was thrown out of the taxi and

warned not to look back. Her handbag was also thrown out. She approached an unknown male and female she first encounterd and informed them of her ordeal. The couple gave her access to a cellphone to call her mother and a taxi fare to go to hospital. The female person she reported to corroborated her evidence on the reporting. From the things they were saying to her, the men were in cahoots and she suspected that they probably knew who she was.

[7] On consent by both parties the court admitted in evidence, the DNA results and the J88 report on the Complainant's medical examination that confirmed the injuries on her vagina, face and thigh.

[8] According to the Appellant when the Complainant boarded the taxi the Appellant and four other male passengers were already in the taxi. The Complainant sat on the seat behind the driver next to the Appellant. One of the men was sitting on the passenger seat next to the driver and two others sitting at the back, behind the Complainant and the Appellant. Soon after the Complainant had paid her fare, the man sitting behind the Complainant jumped over to their seat. The man slided the Complainant's seat and started choking her. The Appellant realised that the Complainant was being robbed and tried to open the door to get away. He was grabbed and threatened with a knife by the man from the front seat. The man held the Appellant down and robbed him of his phone. The Complainant was pulled to the back seat and raped by the two men. The one sitting next to the Complainant took her handbag and passed it on to the guy with a knife who passed it to the driver.

[9] One of the man warned the others that the Appellant was going to tell on them and ordered that the Appellant be brought to the back seat. The man

threatened to kill both the Appellant and the Complainant and ordered the Appellant to rape the Complainant so as to make sure that he does not report the matter. The Appellant raped the Complainant after the second man had done so and alleged not to have been aware when he was in the taxi that this is what the men were going to do. The men thereafter threw the Complainant out of the taxi together with her handbag and told her not to look back. The Appellant could only recognise one of the men. He reported the matter not to the police but to his uncle, a police officer whom he trusted. His uncle promised to look for the perpetrators until he finds them.

Ad conviction

[10] On appeal, the court considers the trial court's finding of fact inclusive of credibility findings from the point of view that unless any misdirection can be identified it is accepted that the trial court's conclusions are correct; see ***S v Dlumayo*** [1]***. Mhlumbi and Others*** **v** ***S*** [2]. In ***S v Manyane and Others*** [3]***,*** the court held that:

> "This court's powers to interference on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

[1] 1948 (2) SACR 677 A 696-699
[2] 1991 (1) SACR 235 (A) 247 (g)
[3] 2008 (1) SACR 543 (SCA)

[11] Consequently even in the instance where the trial court has erred in relation to the burden of proof, its credibility findings are still important in so far as they are not affected by the misdirection[4]. If the appeal court is in doubt on the finding of fact by the court a quo, the latter's decision remains.

[12] In casu, the Appellant had complained that the court a quo erred in finding the Complainant to have been a credible witness and the evidence of the Appellant not to have been reasonably possibly true, without mentioning the specific facts in the Complainant's evidence that renders her version unbelievable. The criticism should be on specific material facts, stating why a witness should not be believed. The Appellant is required to state what could have affected the witness giving credible evidence or made the evidence to be unreliable.

[13] The submissions made on appeal on behalf of the Appellant failed to mention anything of substance that could have affected the Complainant giving credible evidence. There was also no apparent material misdirection that could be pointed out on the court quo's reasoning for rejecting the Appellant's version, or indication of any reasons why the Appellant's version was to be believed or was reasonably possible true.

[14] The Complainant confirmed that she was traumatised and her face kept down, therefore she was not able to see her assailants' faces. She was however adamant that none of the men that raped her was forced or compelled to do so. They were instead actually fighting each other for a turn to penetrate her. The first one to rape her was pushed off by the second one soon after he started.

[4] *S v Tshoko* 1988 (1) SA 139 (A) 142F-143A

They communicated in isiZulu, a language she speaks and understands very well. The court a quo having considered those material facts and the whole evidence, including taking into consideration the Application of the cautionary rule as Complainant was a single witness found the Complainant to have been a credible witness in all material facts and the Appellant's version not to be reasonably possibly true.

[15] As no misdirection by the court a quo could be identified on its finding of fact or reasoning and its decision not to place any probative value on the Appellant's version, the conviction stands.

Sentence

[16] It is the appellants' contention that the sentence imposed by the court *a quo* is severely excessive and the court misdirected itself when it failed to find substantial and compelling circumstances to deviate from the prescribed minimum forms of punishment.

[17] The sentences imposed were as mandated by the Act, that is, a sentence of life imprisonment since the victim was raped by more than one person or more than once and the offence accompanied by a robbery and a sentence of (15) fifteen years imprisonment for a robbery with aggravating circumstances as in terms of s 51 (2) read with Part 11 of the Schedule 2 of the Act. The sentences could only be deviated from if the court had found substantial and compelling circumstances to do so; see ***S v Malgas.***[5]

[5] 2001 (1) SACR 469 (SCA).

[18] It is trite that the imposition of sentence is a prerogative of the trial court. An appeal court will not interfere with a sentence imposed by a trial court, unless it is of such a nature that no reasonable court ought to have imposed it, and is thus grossly excessive, or there was an improper exercise of the discretion by the trial court, or the interests of justice require it. The consideration is not whether the court of appeal would have imposed a lighter sentence if the punishment were within its discretion, but that the sentence must reflect the blameworthiness of an offender and should be proportional to what an offender deserves, see ***S v Dodo.***[6] It should have regard to, and serve the interests of society.

[19] The determination whether or not a misdirection has occurred was clearly set out by Trollip JA in ***S v Pillay***[7], as follows:

> "… 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 inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the 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 a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[6] 2001 (1) SACR 594 (CC)
[7] 1977 (4) SA 531 (A) at 553E-F

[20] What the above suggests is that an appeal court will not lightly interfere with a sentence imposed by the sentencing court unless there is a serious misdirection or a gross irregularity.

[21] It was argued on behalf of the Appellant that all factors relevant to sentencing should be viewed cumulatively to establish if substantial and compelling circumstances exist.

[22] The court a quo when determining the appropriate sentence had the benefit of a presentence report, even though it would have preferred to also have a victim report, considered the nature of the offences committed, the circumstances under which they were committed, the Appellant and the interest of society, following on the prescripts of ***S v Mahlangu and Others***[8]. It was also mindful of the purpose for sentencing, that is retribution, effective deterrence and rehabilitation.

[23] The report emphasised the Appellant's youth and upbringing to have been difficult and played a role in him being involved in crimes. The court correctly pointed out there were no other crimes he had committed except for a traffic offence. The circumstances or details of the crime in casu, actually indicate that the Appellant was under no pressure at the time of raping the Complainant but had fought the other rapist to also get a turn, which is an aggravating factor. They were violent, threatened and assaulted a helpless Complainant. The Complainant suffered not only the indignity of being raped violently but disgustingly in a mode of transport that is used by the public in the presence of other passengers. These are aggravating circumstances which

[8] 2012 (2) SACR 373 (GSJ).

indicate how much of a danger is the Appellant not only to women who find themselves alone with him and his co perpetrators but to society at large. The Complainant was already of no match to the men, the use of violence and insults is numbing and cannot be excused.

[24] The Appellant's personal crcumstances were also taken into consideration, together with the fact that he had spent a period of one (1) year six months awaiting trial and was 22 years old at the time of the commission of the crime. There is nothing regarding his youthfulness that has been shown to may have affected his blameworthiness. He was instead proven to be a daring young man. The court a quo referred to the matter of ***S v Mahlangu and Others*** *supra* in addressing the Appellant's youthfulness, pointing out the finding of the court in that case that the accused's youthfulness and the fact that they spent a lengthy period in custody before finalisation of the matter was not a substantial and compelling circumstances and that the viciousness and the brutality of the offence was against the accused persons. The court held that:

> "Youthfulness has not been held to be a mitigating factor when it is assessed against other factors such as the gravity of the offence, and the gravity of the offence outweighs youthfulness. In this regard a refer to a judgment of this division *State v Obisi* **2005 (2) SACR 350** (WLD). What was said there by Judge Makhanya was:
>
> > "The nature of the crime, the brazenness, the callousness and the brutality of the appellant's conduct show that he attaches no value to other people's lives or physical integrity or to their dignity.

[25] The court a quo correctly found that not only does the seriousness of the offence far outweighs the personal circumstances of the Appellant but his

upbringing cannot be reconciled with his commission of the crime nor may a general conclusion be promoted or endorsed by the courts that persons who had a bad upbringing or grew up without parents commit crimes. Such a general conclusion is discriminatory and cannot merely result in the lessening of the offender's blameworthiness. The Appellant must be able to say specifically what is it in his upbringing that would have led him to disgracefully and violently treat and rape the Complainant.

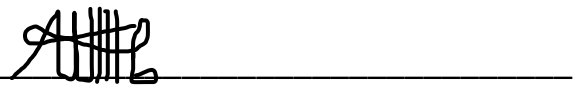
[26] Furthermore, the Appellant lacked remorse as pointed out by the court a quo, and continued to still treat the Complainant with disgust by coining a bizarre story in order to avoid accountability. Such a mindset and behaviour indicates the slim chances of the Appellant being rehabilitated and the importance and gravity of the courts' responsibility to make sure that appropriate punishment is meted out and society is protected against such dangerous and bold offenders.

[27] Overall, the contention on behalf of the Appellant fell short of demonstrating any misdirection by the court a quo in not finding substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence or that the sentence was too severe given the gravity of the crime and aggravating features mentioned.

[28] Under the circumstances the conviction and sentence should stand.

[29] In the result the following order is made:

1. The appeal is dismissed.



N V KHUMALO
JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

I agree,

pp 

S. M MFENYANA AJ
ACTING JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

For the Appellant: H L Alberts
Legal Aid South Africa
hermana@legal-aid.co.za

For the Respondent: R N Sibanda
Director of Public Prosecutions
lwilliams@npa.gov.za