



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

.....
DATE SIGNATURE

CASE NO: A326 /2015

In the matter between:-

Zwane, Titos

Appellant

And

The State

Respondent

JUDGMENT

SIBUYI, AJ:

[1] The appellant was thirty-three (33) years old at the time he was convicted of two (2) counts of rape and one (1) count of kidnapping a nine year old girl and declared unfit to possess a firearm in terms of Section 103 of Act 60 of 2000 by the Kempton Park regional court on 21 April 2015. On 22 May 2015 the regional court sentenced him to life imprisonment in respect of each of the rape counts and 5 years imprisonment for kidnapping. The regional court ordered that the sentences in count 2 and 3 run concurrently and consequently the appellant is sentenced to life imprisonment. The appellant was legally represented throughout the trial.

[2] Having been sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act No. 105 of 1997, the appellant appealed against his conviction and sentence to this court in terms of section 309 of the Criminal Procedure Act, 51 of 1977 ("CPA").

[3] The complainant in this matter was nine (9) years old at the time of the incident. On 2 March 2013 she was kidnapped, taken to the veld, assaulted and raped. She was held captive over the Saturday night and raped for the second time on Sunday, the 3rd of March 2013. She was again held captive over the Sunday night and released on Monday, the 4th of March 2013. The rape was brutal as she suffered severe injuries on her vagina. When she was released she went to the nearest house to seek for help. She was taken to a clinic, referred to a hospital and finally taken to Chris Hani Baragwanath hospital where her injured vagina was repaired inside and outside.

[4] The above facts are common cause. It is also common cause that the complainant knew the appellant very well, their families once stayed together in a house belonging to the appellant's sister; and that on 2 March 2013, prior to the disappearance of the complainant, the appellant visited the complainant's home three times looking for the complainant's father.

[5] What however is disputed is that the appellant is the person who kidnapped and raped the complainant. The appellant denied being the perpetrator of the crimes. The

version of the appellant put to the complainant was that he could not be the perpetrator as on the 2nd, 3rd and 4th of March 2013 he could not have been in the veld with the complainant as he was drinking at a place referred to as extension 28. During cross-examination the appellant raised another alibi defense stating that on 2 March 2013 he was at work between 06h00 and 14h00.

[6] The appellant raised several grounds of appeal. Briefly summarized, the grounds of appeal are as follows: that the learned magistrate failed to approach the evidence of the complainant, being a child and a single witness, with the necessary caution; there are contradictions in the evidence of the state witnesses; and that the learned magistrate erred in accepting the evidence of the state witnesses and rejecting that of the appellant.

[7] The attack on the first ground that the learned magistrate failed to approach the evidence of the complainant with the necessary caution has no merit as the Court a quo correctly considered the testimony of the complainant with caution by considering the credibility of the witness, the probabilities and improbabilities in accordance with the version of the appellant.¹ The Court a quo concluded that the complainant was an impressive witness² and her evidence was in part materially corroborated by the other state witnesses.

[8] The second attack is on the contradictions in the evidence of the state witnesses. I am of the view that the contradictions highlighted by Counsel for the appellant are not material contradictions nor do they materially disturb the complainant's rape allegations.

[9] The third ground relates to the evaluation of evidence in toto. We find no fault with the trial court's credibility findings, nor with its reasoning and conclusions in respect of the convictions on both the kidnapping and rape counts. We have given careful

¹ Record: Page 10, lines 14-19

² Record: page 95, lines 17-21

consideration to both the detailed written and oral submissions in support of the attack on the magistrate's reasons.

[10] We have not been persuaded that the magistrate misdirected himself in any relevant or material respect, in his assessment of the evidence and in his findings of fact, pursuant thereto. The guilt of the appellant on all three counts was established beyond reasonable doubt by the witnesses who testified on behalf of the prosecution, assessed against the facts which were common cause, and the objective circumstances. The full and careful judgment of the magistrate justified his conclusion that the evidence given by the appellant could not reasonably possibly be true.

[11] We therefore found no argument to falter the conviction and / or raise the possibility of misdirection on the part of the learned magistrate. The appeal against conviction therefore ought to be dismissed.

AD SENTENCE

[12] In respect of the appeal on sentence, Counsel for the appellant argued that the magistrate erred in finding that there were no substantial and compelling circumstances; and that the fact that the family of the appellant had suffered arson as punishment for the appellant's illegal conduct ought to have counted in favour of deviation from life imprisonment. Further, that the magistrate misdirected himself when he found that there was no splitting of charges which led to duplication of conviction and multiplicity of punishment in circumstances where the same act(s) was proven by the same evidence and that the learned magistrate failed to appreciate that the kidnaping was motivated by the intention to rape.

[13] The trial court considered the following personal circumstances of the appellant: he was 33 year old; unmarried; had no children; he had no matric but studied

sound engineering at Ekurhuleni West College; he was employed; first offender and that he spent more than a year and two (2) months in custody awaiting trial.³

[13] Over the years our Courts of Appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence; or that the sentence is out of all proportion to the gravity or magnitude of the offence; or that the sentence induces a sense of shock or outrage; or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge; or that the interests of justice require it.⁴

[14] A Court that interferes with a sentence imposed by a lower court itself exercises a discretion when it imposes a new sentence and there cannot, therefore, be a ready-made test in the strict sense of the word. Nor is it advisable to attempt to lay down a general rule as to when the Court's discretion to alter a sentence will be exercised.⁵

[15] The decisions clearly indicate that a Court of Appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that.

[16] The Court of Appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of

³ Record, p276, lines 5-13

⁴Some of the cases in which these principles are mentioned are referred to in the judgment of Selke, J., in *Rex v. Zulu and Others*, 1951 (1) S.A. 489 (N) at p. 490.

⁵ See *Rex v. Sandig*, 1937 A.D. 296 and *Rex v. Ramanka*, 1949 (1) S.A. 417 (A.D.)

Appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with.

[17] Counsel for the appellant contended that we were entitled to interfere with the sentence imposed on the appellant, on the ground that the sentence was “startlingly inappropriate”. We are unable to agree. Life imprisonment is undoubtedly a severe sentence, but the magistrate did not misdirect himself in any relevant respect in imposing that sentence. The magistrate gave consideration to all the other circumstances impacting on the appellant, but he correctly balanced such circumstances against the legitimate interests of the community.

[18] The background facts underlying the conviction and sentence have been adequately dealt with in the trial court judgment and I do not intend to repeat them. I however, intend to highlight certain aspects thereof; aspects which emphasise the brutality of this rape and the indignity and humiliation to which the child was subjected. The fact that the complainant was assaulted, dragged, strangled, forcefully penetrated, kept captive for two (2) full days without food and water, forced to remain naked throughout her captivity, and raped twice qualifies the rape of the complainant as one of the worst imaginable.

[19] The complainant sustained serious injuries: a big haematoma on her right eye that could have been caused by a blunt object, bruised back and buttocks, signs of strangulation, fresh tears of the posterior facia, bleeding, broken hymen with fresh tears at 3, 6, and 9 o'clock, enlarged vagina that could admit two (2) fingers and fresh tears on the perineum. As stated above the complainant's vagina had to be surgically repaired, in and outside. The injuries were so horrific to an extent that both the examining doctor and trial magistrate were shocked.

[20] If life imprisonment is not appropriate in a rape as brutal as this, then when would it be appropriate? We are of the view that this is precisely the kind of matter the Legislature had in mind when it introduced the minimum sentence of life imprisonment in

rape matters. Further, courts must not shrink from their duty to impose, in appropriate cases, the prescribed minimum sentences ordained by the Legislature.

[21] The court a quo correctly evaluated the sentence in terms of the provisions of the Criminal Law Amendment Act, 105 of 1997. It considered whether 'substantial and compelling circumstances' were present. The age of the victim, repetition of the offence, emotional impact, abuse of trust, degradation of the victim and females in general are aggravating factors that cannot be ignored and / or overlooked. The appellant, as a thirty-three (33) year old uncle was duty bound to protect the minor child, and never to abuse her. He dismally failed in that duty. The circumstances of this case are such that the aggravating factors far outweigh the mitigating factors.

[22] We are unable to agree to the contention that the fact that the family of the appellant had suffered arson as a result of the appellant's conduct ought to have been regarded as an exceptional compelling circumstance justifying a lower sentence than life imprisonment.

[23] Further, whilst we accept that the kidnapping was motivated by the intention to rape, there was no splitting of charges which led to duplication of conviction and multiplicity of punishment in the circumstances of this matter. Had the appellant kidnapped, raped and let the complainant go on the first day, the argument could have been valid. However, keeping her after the first rape for two more days establishes intention to deprive her of her freedom. Hence, the finding that the kidnapping charge and conviction thereon are justified.

[24] In fact the learned magistrate, in appreciation of the fact that the rape and kidnapping charges were inter-related, he ordered that the sentences on those charges must run concurrently.

[25] In the result, there is no basis for this Court to interfere in the trial court's decision.

[26] We thus make the following order:

The appellant's appeal against his convictions and sentences is dismissed.

HW SIBUYI, AJ

I agree, and it is so ordered.

**WHG VAN DER LINDE, J
JUDGES OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Counsel for the appellant:	Adv. LS Nkuna
Instructed by:	Legal Aid Board
For the respondents:	Adv. R Ndou
Instructed by:	Office of the Director of Public Prosecutions
Date of hearing:	21 April 2016
Date of Judgement:	29 April 2016