

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

CASE NO: A272/2013

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

13/10/2017.....
DATE

.....
SIGNATURE

In the matter between:

LESLEY MERVIN SIMMADARI,

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MIA, AJ:

[1] The appellant was charged and convicted, in the Regional Court, Johannesburg, on three charges:

1. Count one: kidnapping
2. Counts two and three: rape.

[2] The appellant was sentenced to five years imprisonment on the charge of kidnapping and fifteen years imprisonment for each of the rape charges. The five years' imprisonment on the charge of kidnapping was ordered to run concurrently with the first term of fifteen years imprisonment on the charge of rape. The effective term of imprisonment is thus a period of thirty years direct imprisonment. The appellant now appeals against conviction and sentence with leave of the Court *a quo*.

[3] The complainant, P V was 20 years old when she commenced working for Lesley Mervin Simmadari, the owner of an import and export company, as his personal assistant in 1993. I set out her evidence in what follows. Three weeks after she commenced her employment she was required to accompany Mr. Simmadari to Lesotho on a business trip. Upon their return from Lesotho on 22 May 1993, the driver drove to Mr. Simmadari's flat. Ms. V requested to be taken home and was told the driver would take her later that day. She was afraid of Mr.

Simmadari and waited. Later the driver left and again she requested to go home. Mr. Simmadari informed her he would take her home himself. Mr. Simmadari's two male friends were still present drinking coffee. After they left she took the cup which she used to drink coffee to the kitchen.

- [4] Mr. Simmadari followed her. In the kitchen Mr. Simmadari took her hand and pulled her to the room. She resisted and he picked up and carried her over his shoulder to the room. She was screaming and kicking. He threw her onto the floor and kicked her in her stomach and slapped her in her face. He placed her on the bed and undressed her. Mr. Simmadari had a firearm and threatened to shoot her if she did not co-operate. It was placed in her mouth initially. He undressed her and put his penis inside her vagina and had sexual intercourse with her. He ejaculated on her stomach and then told her to lie on the bed next to the wall. The fire arm lay on a cabinet next to the bed. When she tried to reach over to take the firearm, he hit her with the back of his arm. She lay facing the wall all night.

- [5] The following morning, the 23 May 1993, he told her to go to the bathroom to clean herself. He would not allow her to lock the door but kept his foot in between the door and the door frame. The following day she could not leave the flat as the door was locked. She was forced to have sexual intercourse with the appellant that day again. He

ejaculated outside her vagina and on her stomach again. On the 24 May 1993, the driver arrived to take them to the office. When they arrived at the office the appellant told the driver to take Ms. V home. On the way to her home, she informed the driver of the rape that had taken place. He cried when he heard and could not believe the appellant was capable of such conduct.

[6] Upon arriving at home Ms. V found her mother ironing. She told her mother that she had been raped. Her father was informed and he returned home. They proceeded to the Hillbrow Police Station to lay a charge. The appellant was arrested. Ms. V was taken to the doctor for treatment and to complete the medical report required for the investigation. She was given medication and her injuries were noted. The medical report noted she had a bite mark on her left arm just below her elbow and bite marks and bruises on her neck. The report also notes that the hymen was torn and bruised. The fouchette and perineum were bruised and the examination was painful. Her mental state is recorded as upset and withdrawn. Whilst vaginal smears were taken the results show that no semen was found on the samples.

[7] The appellant did not dispute having sexual intercourse with the complainant on the days in question namely 22 and 23 May 1993. He maintained however that the intercourse was consensual. He denied keeping the complainant in the flat against her will and forcing the

complainant to have sexual intercourse. He stated that the complainant initiated the sexual intercourse and he was unable to resist her advances. He explained that he informed the complainant that he was married and that he would not be able to commit to marrying her. He stated that he could not engage in sexual intercourse with her as he was married and she would end up getting married eventually. He however also stated in his evidence that he commenced a relationship with the complainant within days of her commencing employment. He explained that he collected money and kept large sums of money which she kept for him. He loaned her money which caused her to become possessive over him. This resulted in her insisting on accompanying him to Lesotho.

- [8] The Court *a quo* analysed the evidence and found inconsistencies in both the complainant and the appellant's evidence. The Court *a quo* however was mindful of the cautionary rule applicable to the complainant's evidence in view of her being a single witness and in considering the evidence applied the caution applicable and accepted the complainant's version. The Court *a quo* found that the complainant was a new employee; she was young and naïve and had commenced employment for only three weeks. She had testified that she was afraid of the appellant. She had requested to go home. There were two big men surrounding her who prevented her escape upon her arrival in Johannesburg after her ordeal in Lesotho. The appellant had initially informed her that the driver would take her home and later indicated he

would take her home. This did not materialize. Instead, she was held against her will in the flat. The two men remained behind after the driver left and prevented her from leaving. The door was locked further preventing her escape. The following day the two men returned preventing her escape. She was forced to have sexual intercourse with the appellant on both occasions.

AD CONVICTION

[9] Ms. Lekgothoane appearing for the appellant submitted that the State had failed to prove its case beyond reasonable doubt and the Court *a quo* erred in finding the appellant guilty on all three counts. Further she submitted that the magistrate did not apply the cautionary rule to the appellant as a single witness. She submitted the complainant's evidence did not meet the requirement required of a single witness in that it was required to be satisfactory in all respects and without contradiction. The complainant's evidence was not satisfactory as there were contradictions which were not minor but spoke to the core of what occurred regarding what happened and where it occurred, so she submitted.

[10] Ms. Lekgothoane submitted further that the medical evidence in the J88 and the evidence of the complainant contradicted each other namely that she had love bites on her neck and that she was sodomised. She submitted that the complainant was not truthful about

what occurred. She submitted that the Court *a quo* was not clear in its judgment regarding what it found to be proved beyond reasonable doubt. This, so she submitted, further reinforced the view that the state had not proved its case beyond reasonable doubt as the Court *a quo* did not indicate what it found to be proved beyond reasonable doubt.

- [11] She submitted further that the appellant denied raping the complainant and the Court *a quo* erred in not accepting the appellant's version as reasonably possibly true. Rather, she further submitted, the Court expected the appellant to prove his innocence. She submitted that the method and reasoning used by the Court *a quo* was incorrect. She submitted further that the Court *a quo* descended into the arena and cross examined the appellant and convicted the appellant without applying its mind to the facts of the case and the law relating to the case. In view hereof, she submitted that the appeal ought to succeed. Further that the Court *a quo* was not convinced by the complainant's evidence and thus ought to have given the appellant the benefit of the doubt and acquitted him.

- [12] The powers of a Court to interfere on appeal with the facts of the trial court are limited. With regard to the conviction the Court held in *S v Hadebe* 1997(2) SACR 641 (SCA) 645 e-f

“... 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 proves them to be clearly wrong”

[13] I have considered the record and reasons of the trial court. The magistrate commences his judgement by indicating how he intends dealing with the judgment and uses a recognised formula¹ to analyse the evidence. He specifically reminds himself about the cautionary rule² in section 208 of the Criminal Procedure Act 51 of 1977. He finds contradictions in both the complainant as well as the appellant’s evidence. Ultimately he finds that the complainant was a young naïve new employee who was not capable of seducing a man twice her age as testified by the appellant. Further the Court *a quo* found that it was unlikely that the sexually inexperienced 20 year old complainant would be capable of seducing the appellant within days of commencing employment. The appellant testified that a relationship commenced a few days after the complainant commenced employment. Finally, the independently verifiable medical evidence reflected in the J88 reflecting the torn hymen and bruising correctly persuaded the Court *a quo* to find that the sexual intercourse was not consensual.

[14] In contrast the appellant’s evidence differed with regard to the complainant’s terms of employment being three weeks versus two months. The Court accepted that the complainant had only been employed for three weeks. The power relationship inherent in the age

¹ Record p247, line 1 IFILARO

² Record p 251, line 21

difference as well as the employer-employee relationship did not support the appellant's version. This was reaffirmed by the complainant's evidence that she was afraid of the appellant.

[15] The Court *a quo* was also influenced by the credibility of the appellant in relation to his evidence regarding his age. He appeared to be unable to furnish responses regarding his age spontaneously. His responses regarding the three names he purported to hold also suggested *mala fides* and it appeared that he was already serving a sentence in this regard. He had changed his identity allegedly and testified that it was possible to do so at a cost. The Court *a quo* expressed surprise and incredulity that a mature person could not take responsibility for his own actions in the sexual encounter with the complainant. If indeed it was consensual then it would follow that both parties would have participated equally. The appellant's suggestion during evidence was that the complainant had initiated the sexual engagement, led the engagement and that he was a passive role player throughout. This version defied reality in the Court *a quo*'s view and was rejected.

[16] In *S v Shackell* 2001 (2) SACR 185 SCA at para [30], Brand JA held:

"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.”

[17] I am of the view that the Court *a quo* considered the appellant's version on the basis suggested by Brand JA in *Shackell* above. The Court found that the appellant's version was not reasonably possibly true in view of the inconsistencies in the appellant's version. The first being his inability to recall his age which suggested that he was making up his version as he went along. He contradicted himself with regard to the time the complainant worked at the company. Whilst individual aspects of the appellant's evidence on their own do not appear to discount the appellant's version, however when considered in totality the appellant's version was clearly so fanciful and improbable that it cannot possibly be true.

[18] I am unable to find that the Court *a quo* misdirected itself on the record with regard to the conviction. It applied the cautionary rule to the evidence of the complainant. Whilst there were inconsistencies in the complainant's evidence these were minor inconsistencies. The independently verifiable evidence namely, the medical report, was

consistent to the extent that it reflected tears in the hymen which would be consistent with the complainant's evidence that this was her first sexual experience and non-consensual. The absence of semen is understandable in light of the complainant's evidence that the appellant withdrew and ejaculated on her stomach on both occasions. The Court *a quo* accepted that the Khan brother's assisted the appellant in preventing the complainant from escaping and the locked door prevented her further escape as did the threat of the firearm and the physical assault and threat of harm. On perusal of the record there was no misdirection by the Court *a quo*. The version of the appellant was correctly rejected when the Court *a quo* found that it could not have been reasonably possibly true in view of the inherent inconsistencies highlighted above.

AD SENTENCE

- [19] Counsel for the appellant submitted that the Court *a quo* completely ignored the element of mercy which is a hallmark of civilization and enlightened administration of justice. She submitted that this important principle ought not to be overlooked lest the Court be reduced to the level of the criminal. She highlighted that true mercy ought not to be mistaken for softness, weakness or maudlin sympathy for the criminal. She submitted that justice must be done and that there should not be an over reaching so that justice felt like a sledge hammer where mercy was absent. She submitted further that sentencing was individualized

and referred to the decision in *S v Mako* 2005 (2) 223 ECD where the Court at p 228 at para [10] per Plasket highlighted that:

“[10] Secondly, one cannot lose sight of the individualised nature of the sentencing process and it is irregular to sacrifice the accused on the altar of deterrence: In *R v Mzwakala*⁶ Schreiner JA stated that 'even where a crime is very grievous in its effects or possible effects it is not proper to disregard the history and circumstances of the accused and the subjective aspect of the crime' and in *S v Sobandla*⁷. Howie AJA held as follows where a magistrate had imposed an exemplary sentence in an effort to act as a deterrent: 'Essentially what the trial Court had in mind was, in the interests of the community, a sentence which would deter others who might, given the prevalence referred to, contemplate similar serious criminal conduct. Having regard to all the facts of the present matter, however, it seems to me that appellant's counsel . . . was right in contending, in effect, that appellant was sacrificed on the altar of deterrence, thus resulting in his receiving an unduly severe sentence. Where this occurs in the quest for an exemplary sentence, a trial Court exercises its discretion improperly or unreasonably.' “

[20] Ms. Lekgothoane submitted that the Court *a quo* erred in not exercising its discretionary power to impose a lesser sentence. She submitted that even where the appellant is legally represented there was an obligation on the Court to establish whether substantial and compelling circumstances existed which justified the imposition of a lesser sentence. She referred to *S v Gagu* 2006 (1) SACR 457 (SCA) as

authority for the principle that the magistrate must establish facts necessary for imposing sentence. She submitted that whilst there was no prescript regarding what was substantial and compelling it was now trite that the traditional factors ordinarily taken into account could amount to substantial and compelling factors.

[21] Ms. Lekgothoane referred to the decision in *S v Bull and Another, S v Chavulla and other* 2001 (2) SACR 681 SCA where the Court at 694 warned against harsh sentences as follows:

“[22] This Court has repeatedly warned against excessively long sentences being imposed by trial Courts in an attempt to circumvent the premature release of prisoners by the executive branch of government.”

[22] She submitted that the Court *a quo* over emphasized the interests of society over the personal circumstances of the appellant where the appellant was an elderly person aged 58 years old, suffering with high blood pressure since his incarceration. The Court *a quo* had failed to consider that the appellant became permanently paralysed whilst in prison since 2009 and was a diabetic. The Court had further failed to take into account the period that the appellant had spent in prison awaiting trial. This period she submitted ought to have been factored into the time period when the term of imprisonment was considered. She submitted thus that the above factors taken cumulatively

amounted to substantial and compelling circumstances which justified a deviation from the minimum prescribed sentences.

[23] Mr Serepe appearing for the state submitted that this Court ought to consider that the offences were serious and that the sentences were justified under the circumstances.

[24] The offences took place in 1993. The trial commenced in 2009. The charge sheet makes no reference to the Criminal Law Amendment Act, Act 105 of 1997. In view hereof the Criminal Procedure Act 51 of 1977 and the Magistrates Court Act 32 of 1994 find application. The Criminal Law Amendment Act 105 of 1997 does not find retrospective application. The magistrate's jurisdiction for rape an offence committed in 1993 was guided by Section 92(1)(a) of the Magistrates Court Act 32 of 1994 which provided that:

“(1) Save as otherwise in this Act or in any other law specially provided, the Court, whenever it may punish a person for an offence–

(a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding twelve months, where the Court is not the Court of a regional division, or not exceeding **ten** years, where the Court is the Court of a regional division”.

(my emphasis)

The section was amended by section 61 of the Magistrates Lower Courts Act 120 of 1993 which was assented to on 9 July 1993 to provided that:

“92 Limits of jurisdiction in the matter of punishments

(1) Save as otherwise in this Act or in any other law specially provided, the Court, whenever it may punish a person for an offence-

(a) by imprisonment, may impose a sentence of imprisonment for a period not *exceeding three years*, where the Court is not the Court of a regional division, or not exceeding **15 years**, where the Court is the Court of a regional division; “ **(my emphasis)**

The increased penal jurisdiction was not applicable at the time the offence occurred. It was however applicable when the trial commenced in 2009. Whilst it does not amount to application of a new law. I am persuaded by the view expressed by Mokgoro J in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division*, 2007(3) SA 210 (CC) at [37] that:

“ ...to retrospectively apply a new law, such as s 92(1)(a), during the course of the trial, and thereby to expose an accused person to a more severe sentence, undermines the rule of law and violates an accused person's right to a fair trial under s 35(3) of the Constitution”.

And at [38]

“The unfairness derives from the uncertainty created by the retrospective application of the amended s 92(1)(a) during the course of the trial, which exposes the applicant to a sentence more severe than that which was competent when he tendered his plea. Whether the applicant deserved a lighter or heavier sentence is also not at issue in this matter. The crime committed is heinous, no doubt, and a conviction could have carried a life sentence had the applicant been arraigned before the High Court. The seriousness of the offence itself should have served as an indicator that the applicant should have been arraigned before the High Court. It may be that from the perspective of the community and in view of the facts of this case, the applicant's sentence of 15 years was too lenient and for that reason

not unfair. However, the guarantee of the right to a fair trial applies in all criminal trials, notwithstanding the heinous nature of the offence.”

To the extent that the sentence imposed was fifteen years imprisonment the Court *a quo* exceeded the sentencing jurisdiction applicable at the time the offence was committed and this amounted to a misdirection. The delay in prosecution between 1993 and 2009 has not been attributed to the appellant.

[25] In *S v Rabie* 1975 (4) SA 855 (A) at 857 the Court set out the following guiding principles with regard to interference with a sentence on appeal:

“1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –

(a) should be guided by the principle that punishment is

“pre-eminently a matter for the discretion of the trial Court”;

and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised”.

(2) The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”

[26] In view of the misdirection of the Court *a quo* with regard to sentencing it is appropriate to interfere with the sentence. Whilst the submissions

of Ms. Lekgothoane are kept in mind, Courts are expected to send a clear message that behavior such as that of the appellant will not be tolerated. Women deserve equal protection of the law in their daily lives. Conduct such as that of the appellant where the complainant was initially kept against her will by her employer, and then physically attacked, threatened with a firearm and forced to have sexual intercourse must be met with the full force and effect of the law. This Court is mindful of the seminal decision often referred to *S v Chapman 1997 (2) SACR 3 (SCA)* at p 5 A-D where the Court noted

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution....

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”

[27] This Court is also mindful of the rising number of offences which may suggest that it is not wise to move away from the pre-ordained sentence. In *DPP, North Gauteng v Tabethe 2011 (2) SACR 567 (SCA) 577 G-I*, the Court 14 years later noted that:

“Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our Courts have an obligation to impose sentences for such a crime — particularly where it involves young, innocent, defenceless and vulnerable girls — of the kind which reflects the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system. Regrettably, the Court below omitted to pay attention to these important considerations. In fact, it is clear to me that the Court below accorded undue weight to the respondent's personal circumstances and paid scant regard to the seriousness of the offence and the broader interests of society. It appears to me that the learned judge in the Court below inadvertently allowed maudlin sympathy for the respondent to cloud his better judgment. The result is a sentence which is disturbingly disproportionate to the seriousness of the offence. Any crime that threatens the wellbeing of society deserves a severe punishment”.

[28] Further having regard to the record, it is evident however that the period in custody does not feature in the Court *a quo*'s determination of sentence. The Court *a quo* considered various factors and appears to have considered the personal circumstances of the

appellant as placed on record by the legal representative against the aggravating circumstances by directing that the sentence on count one run concurrently with the sentence on count two. This appears to have taken into account the appellant's medical condition and reflects some mercy on the part of the Court *a quo*. The appellant was serving a term of imprisonment at the time and was due for parole. A non-custodial or suspended sentence or correctional supervision as sentence was however not appropriate under the circumstances. The record reflects that the appellant complained about not receiving adequate care whilst in custody to the extent that he requested an order that the Court grant an order for euthanasia which was initially granted per error. The Court *a quo* had not been aware that it was granting such an order and subsequently revoked such order.

- [29] The record indicated that the appellant has prostrate problems and uses adult diapers which are seldom changed, according to the appellant. He reported not eating regularly at prison as he is not assisted and there is no support for his condition. A Probation Officer's report was clearly necessary to investigate the concerns raised and to determine the care received. In view of the health care concerns raised it is not clear why the appellant is not receiving the care required or whether he is indeed receiving the care required but is unable to reconcile himself with the conviction and circumstances he now finds himself in and seeks to find a way out. A new identity

was the solution to his previous predicament, however in prison this is no longer a possibility. A Probation Officer's report and medical reports would also confirm how best to manage his health concerns such as his diabetic and blood pressure conditions and the care available in the correctional facility and the support available.

[30] The Court *a quo* did not request such reports and considered a lengthy term of imprisonment. I am of the view that the failure to request such report resulted in the appellant's personal circumstances not being fully and properly considered without the benefit of this information. The Court at some stage stood the matter down to address this matter with the prison authorities; however the record does not reflect what the outcome of such discussions were. The Court however correctly considered that a lengthy term of imprisonment was appropriate.

[30] Having regard to the record, I am of the view that the absence of a Probation Officers report in circumstances such as the present where the appellant presented with so many health concerns amounted to misdirection by the Court *a quo* as did the imposition of a sentence which was beyond the Court's jurisdiction applicable at the time the particular offence was committed. The particular presiding officer has since retired and this may well have played a role in seeking to expedite the finalisation of the matter which had run for four years already. In view of the misdirection it is appropriate to interfere with

the sentence. I propose that the offending portions of the sentence be set aside and be replaced with an appropriate order in respect of counts 2 and 3.

[31] In the circumstances, I propose that the following order be made:

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds.
3. The sentence handed down by the magistrate on count 2 and 3 is set aside, and is substituted by the following sentence which would have been a competent sentence to impose- On counts 2 and 3 the accused is sentenced to 10 years imprisonment on each count. The five years imposed on count one are ordered to run concurrently with the 10 year sentence imposed on count 2, resulting in an effective sentence of twenty years.

S C Mia

Acting Judge of the High Court, Johannesburg

I agree and it is so ordered

D Mlambo

Judge President of the High Court, Johannesburg

Appearances:

On behalf of the applicant : Adv SP Lekgothoane

Instructed by : Legal Aid Board

On behalf of the respondent : Adv J Serepo

Instructed by : DPP

Date of hearing : 9 October 2017

Date of judgment : 13 October 2017