

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

CASE NO: A36/2019

In the matter between:

VUSI ABEDNIGO MASILELA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

COLLIS J (KHUMALO J Concurring)

Introduction

[1] This is an appeal against sentence. On 28 October 2014, the appellant pleaded not guilty in the regional court Cullinan on the following charges:

- 1.1 Count 1 : Housebreaking with the intent to rape and attempted rape read with the provisions of section 51 of the Criminal Law Amended Act, Act 105 of 1997
- 1.2 Alternative Count 1: Sexual Assault.

[2] The appellant was convicted on the main count and sentenced to 15 years direct imprisonment on 4 November 2014.

[3] The appellant applied for Leave to Appeal and condonation for the late application on 18 August 2015. The application for condonation was however refused by the court *a quo*.

[4] On 21 November 2018, Leave to Appeal on petition was granted to the appellant. The leave so granted, was only in respect of sentence.

[5] It should be mentioned that throughout the proceedings in the *court a quo* the appellant was legally represented.

The facts

[6] Briefly the evidence presented before the *court a quo* can be summarized as follows: The complainant Ms. S[...] M[...], testified that on the 1st June 2014 at around 17h00 she was at home, with her security alarm armed. Shortly, thereafter she heard a window breaking and this activated her alarm. The security firm, G Force called her and she made a report to them. A member of the security firm arrived, searched her premises and house and found one of her windows broken. This was reported to her. No one was found on her premises and she was instructed by the guard to arm her alarm once more as the guard had to attend to another call. He nevertheless had summonsed the police to attend to her premises.

[7] Shortly, after the guard had left her alarm was activated a second time, her bedroom door was kicked open by the appellant and he ordered her to disarm her alarm and to undress. She pretended to switch off her alarm and started to scream as she fell to the ground.

[8] Her neighbour Mr M[...] V[...], who also testified arrived at her house and managed to pull the appellant off her. Appellant was then dragged out of her house and the security guard arrived back on the scene.

[9] The security guard O[...] M[...] confirmed the evidence of the complainant and that of Mr V[...] in as far as their evidence tendered before the court related to him.

[10] The appellant testified in his own case. He denied all the allegations against him. His testimony in short was that on the day in question he was walking down the street and whilst he was doing this, he was grabbed by two white people outside the complainant's property and thereafter taken inside her property. He conceded that inside the complainant's property he was identified by her as her assailant.

Grounds of Appeal

[11] The appellant assails the sentence on the assertion that the effective sentence of 15 years imprisonment imposed in respect of count 1 for Housebreaking with the intent to Rape and Attempted Rape where the charge sheet include citation of section 55 of the Sexual Offences and Related Matters Act 32 of 2006, is more than the prescribed minimum sentence for a first offender convicted of rape, and therefore shockingly harsh and inappropriate. Furthermore the appellant's legal representative, did not address the trial court on the issue of substantial and compelling circumstances which may justify the imposition of a sentence less than the prescribed minimum sentence.

Evaluation

[12] Albeit, that sentencing is inherently within the discretion of the sentencing court the powers of an appeal court to interfere with the sentencing court's discretion in imposing a sentencing are limited unless the sentencing court's discretion was exercised improperly. The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong but whether the sentencing court exercised its discretion properly and judicially.

[13] If the discretion was exercised improperly the appeal court will interfere with the sentence imposed.¹

[14] It is further that where the sentence is deemed to be "startlingly inappropriate" or induces a sense of shock with there being a striking disparity between it and the sentence the appeal court would have imposed, the appeal court is entitled to "interfere with such sentence because such sentence shows that the court imposing the sentence failed to properly and reasonably exercise the discretion bestowed upon it."²

[15] In order to determine this appeal, it is important to have regard to the provisions of section 51(2) of the General Law Amendment Act 105 of 1997. It reads as follows:

Section 51(2): "Notwithstanding any other law but subject to subsections (3)

¹ S v Malgas 2001(1) SACR 469 (SCA)

² S v Wright 2000 (1) SACR 322 (SCA) at 324h & S v Michele & Another 2010 (1) SACR at 134h

and (6), a regional court or a High Court shall sentence a person who has been convicted of any offence referred to in -

(b) PART III of Schedule 2, in the case of-

- (i) a first offender, to imprisonment for a period not less than 10 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it may impose in terms of this subsection by more than five years."

[16] Subsection 3(a) further provides as follows:

"If a court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances **exist** which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years."

[17] It will also be apposite to have regard to the provisions of section 55 of Act 32 of 2007, which provides as follows:

'55 Any person who -

- (a) attempts;
- (b) conspires with any other person;
- (c) aids, abets, induces; incites; instigates; instructs; commands counsels or procures another person to commit a sexual offence - in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that

offence would be liable.'

The sentence

[18] Before the court *a quo*, the following factors were placed before the court in mitigation of sentence.

- 18.1. The appellant was 26 years old at the time of his arrest;
- 18.2. He is a first offender;
- 18.3. The appellant had part time employment at the time of his arrest;
- 18.4. The appellant spent 5 months awaiting trial.

[19] The *court a quo*, when imposing sentence took into account the personal circumstances of the appellant; the seriousness of the offence and the interest of society.³

[20] The trial court held as follows:

"Now an offence of rape of a minor person carries a sentence of minimum sentence of 10 years imprisonment. It is the same if it is attempted rape, it is irrelevant. And the crime you were convicted of is according to me and I agree with the State Prosecutor, more serious as that one of rape because this was housebreaking with the intent to rape and attempted rape." ⁴

[21] Before this court the question that begs an answer is whether the imposition of a prescribed sentence for "attempted rape" is provided for. In *S v Silo* 2016 (2) SACR 259 (WCC) at 266E Henney J made the following findings.

"In this particular case the offence the appellant had been convicted of was an attempt to commit a rape in terms of Section 3 of SORMA.

On a basic understanding of the provisions of section 55 relating to sentence it seeks to give power to a court to impose the same punishment on a person convicted of attempting to commit any of the offences mentioned in SORMA as would be imposed on a person convicted of actually committing that

³ Transcribed record p 73 Lines 20 - 25.

⁴ Transcribed record p 74 Lines 3-8.

offence.

The types of punishment a court can impose are set out in section 276 of the CPA. Such punishment in the case of a magistrates or regional court is subject to the limits imposed on its jurisdiction as set out in section 92(1) (a) of the Magistrates' Court Act 32 of 1944. This power to impose a sentence is however subject to the provisions of any other law, which can either be any Statute which prescribes a specific sentence or the Minimum Sentencing Act. In my view that would be the same punishment which such an offender would be liable to undergo, either in terms of the court's sentencing powers or in terms of the provisions of section 276 of the CPA. See *Director of Public Prosecutions, Western Cape v Prins and Others* 2012(2) SACR 183 (SCA) [(2012) ZASCA 106].

The Minimum Sentencing Act does not make express provision for the imposition of a prescribed sentence in any of Part I - IV of Sch 2 in the sentencing of an attempt to commit any of the listed offences. However SORMA prescribes that an offender may be liable upon conviction of an attempt to commit rape in terms of section 3 or section 4, to a punishment which such offender would have been subjected to if such offender had actually committed such an offence. In this particular case the prosecution revealed in the charge sheet that it would be relying on the provisions of the Minimum Sentencing Act, and in particular the provisions of Part III of Sch 2, which prescribes a sentence of 10 **years** imprisonment, unless of course the court finds that there are substantial and compelling circumstances to deviate from such prescribed sentence.

There is no doubt in my mind that the regional magistrate was correct in applying the provisions of the Minimum Sentencing Act"

[22] The findings espoused in the above-mentioned decision is precisely the rationale employed by the court *a quo* in that the offence of "attempted rape" carries a

minimum sentence of 10 years imprisonment, unless the *court a quo* finds substantial and compelling circumstances present to deviate from the minimum prescribed sentence, which it did not.

[23] *In casu*, the trial court had found that the appellant had showed no remorse for his actions.⁵ The court further had found that the appellant had planned his offence; that he could have walked away after the security guard arrived at the premises, but that he elected not to. The court *a quo* further remarked, that the fact that Ms. Mako was indeed not raped on the day was as a result of the intervention by her neighbour Mr Viviers who arrived on the scene.⁶

[24] The above reasons postulated above are indeed the reasons which motivated the regional magistrate to impose a sentence higher than the minimum sentence prescribed.

[25] Ms Van Wyk on behalf of the appellant had argued that the record is silent that the parties were afforded an opportunity to make submissions to the regional magistrate before the regional magistrate imposed a maximum sentence.

[26] In *S v Maake* 2011(1) SACR 263 (SCA) the court held as follows with regards to the positioning of the maximum sentence:

"that on the record there was no indication at all that the imposition of the maximum sentence provided for in section 51(3) had been within the magistrate's contemplation. In any event although the appellant had been represented, the fact that there had been no indication of an intention to impose the maximum sentence meant that the representative had not had the opportunity to make submissions in this regard. It was as necessary in relation to maximum sentences as it was regarding minimum sentences that a court identify on the record the factors that took the case out of the ordinary, otherwise the legislation's purpose of a reasonable consistent and standardised approach to sentence would be defeated, and it would be open to presiding officers who had particularly stern views on sentence and who regarded the legislature's response as inadequate to impose their view in disregard of the purpose of the legislation. In the result the maximum sentence imposed fell to be set aside."

⁵ Transcribed Record p 74 Line 23.

[27] *In casu* the regional magistrate imposed the maximum sentence of 15 years on the appellant without the legal representative of the appellant being afforded an opportunity to make submissions in this regard.

[28] This failure by the learned regional magistrate constitutes a misdirection which calls for an interference with the sentencing court's discretion.

[29] Having said that housebreaking with the intent to rape and attempted rape induced a fear to the victim who found herself in the sanctity of her home, where she expects to be safe. Apart from the aforesaid the offence of rape would have been completed had it not been as mentioned before, for the intervention of her neighbour.

[30] Our courts further carries the responsibility to send a clear message to our communities that crime will not be tolerated and that violence perpetrated against our communities, especially our women is unacceptable. This can only be shown by the sentences meted out by our courts. However *in casu* and having regard to the facts and more so the absence of affording the parties an opportunity to make submissions as mentioned *supra*; imposing the maximum sentence was not warranted under the circumstances.

[31] Accordingly, the appeal on sentence must succeed, and as a result I proposed as follows:

31.1 The appeal against sentences is upheld.

31.2 The sentence of (15) fifteen years imposed by the court *a quo* in respect of the main count is set aside and replaced with the following:

31.2.1 In respect of the main count Housebreaking with intent to Rape and Attempted Rape, the appellant is sentenced to a period of 10 years imprisonment.

31.2.2 The sentence is antedated to 4 November 2014 in terms of Section 282 of the Criminal Procedure Act, Act 51 of 1977.

**JUDGE OF THE HIGH COURT OF
SOUTH AFRICA**

I agree

**KHUMALO J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA**

It is so ordered.

Appearances as follows:

Counsel for the Appellant	: Adv. L. A Van Wyk
Attorney for the Appellant	: Legal Aid South Africa
Counsel for the Respondent	: Adv. D. Rosenblatt
Attorney for the Respondent	: Director of Public Prosecutions Pretoria
Date of Hearing	: 28 November 2019
Date of Judgement	: 24 January 2020