

**IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION,
KIMBERLEY.**

Not reportable

Case no: CA & R 16/19

In the matter between:

AYANDA MTHINI

APPELLANT

And

THE STATE

RESPONDENT

Heard: 06 May 2019

Delivered: 30 August 2019

Coram: Phatshoane J and Pakati J

JUDGMENT

PHATSHOANE J

- [1] Mr Ayanda Mthini, the appellant, and Mr Michael Gqedyua, his co-accused, stood trial as accused No1 and No 2, respectively, before a Regional Court Magistrate, Ms A.I. Venter, sitting at the Regional Court, Colesburg. They faced two counts of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, and were convicted as charged on 03 July 2012. The convictions were taken together for purposes of sentence and each one was sentenced to life imprisonment.
- [2] The appellant was out of time in noting his appeal and therefore sought condonation which the State did not oppose as it is apparent from the record that

there were various delays which could not be attributed to him. I can conceive of no prejudice if condonation is granted and it is so ordered.

- [3] The appeal is directed against the sentence only in terms of s 309(1)(a) of the Criminal Procedure Act, 51 of 1977 ("the CPA"), which affords convicted and sentenced persons an automatic right to appeal if the accused person was sentenced to imprisonment for life by a Regional Court under s 51(1) of the Criminal Law Amendment Act, 105 of 1997 ("the minimum sentence legislation"). He or she may note an appeal without having to apply for leave in terms of s 309B.

- [4] In the main Mr Steynberg, for the appellant, contended that the Court *a quo* erred in finding that there were no substantial and compelling circumstances justifying a departure from the imposition of a sentence of life imprisonment; that the sentence imposed was shockingly harsh and inappropriate in that it is disproportionate to the crime, the circumstances of the offender and the interest of the society; and further that the appellant is a good candidate for rehabilitation.

- [5] The State's case was as follows. On 26 March 2010 at about 19h30 the 16 year old Ms JVR, the complainant, accompanied accused No 2 to "Die Hoek" Township to look for her cousin, Stompie, who happened to be accused No 2's girlfriend, but could not find her. On their way back home they were accosted by the appellant who blocked the complainant's way. She fled but fell on her knees. The appellant grabbed her arm and pulled her; she tried to break-free but he held her tight; she loosened the grip and ran towards accused No 2's mother, who was slightly inebriated and told the complainant to leave her alone. She ran towards her aunt's in-law's house but because the dog was barking loud they could not hear her screams. The appellant caught up with her; grabbed her by her throat; and closed her mouth.

- [6] The appellant and accused No 2 pulled the complainant to a desolate red brick house with no doors or lighting. The appellant informed accused No 2 to have intercourse with the complainant first. She testified: "*En toe hou hy die klip hier by my gesig, hier by die deur-waar ek by die deur staan....hy wou my gekap het met die klip in my gesig. Toe skreeu ek.*" The appellant missed her with the stone

because she ducked. Accused No 2 ordered her to take off her pair of trousers. She refused. Accused No 2 lowered her trousers. He climbed on top of her; penetrated her vagina with his penis; and had intercourse with her. She kept screaming and crying. The appellant kept guard at the door. When accused No 2 had completed his misdeed the exact roles were reversed. The appellant climbed on top of the complainant; inserted his penis into her vagina and had intercourse with her.

- [7] The 19 years old Ms Bukelwa Jacobs corroborated the complainant's version in material respects. At about 19h00 on 26 March 2010 Bukelwa and her friends including accused No 2's brother, Jonathan (Nosi) Gqedyua, came across accused No 2 and the complainant who both said that they were on their way to look for accused No 2's girlfriend. Bukelwa noticed the appellant running towards the complainant and enquired from accused No 2: *"How does he leave a "top notch" alone"*. Bukelwa witnessed the brawl as described by the complainant. She also heard the complainant scream that *"he should not kill her"* because the appellant had picked up a stone.
- [8] Bukelwa saw the complainant being dragged by the appellant to a desolate house situated opposite her home, approximately 15 meters away, while accused No 2 was following them. She saw accused No 2 standing in the passage of the old house. Bukelwa and one Kaaitjie reported the incident to the police. They, escorted by the police, pounced on the appellant who was with the half-naked complainant. Accused No 2 was nowhere to be seen. Bukelwa observed that the complainant had her panty and pants in her hands and was crying and also shivering. The appellant told the police that he engaged in the sexual intercourse with the complainant in return for the payment of R50.00 which allegation was denied by the complainant. Jonathan (Nosi) Gqedyua, accused No 2's brother, also heard the complainant screaming and saw her cry.
- [9] Constable Mario Baardman, who accompanied Bukelwa to the scene, in essence corroborated Bukelwa's account as they were in each other's presence. The appellant informed the officers that he had an accomplice and undertook to take the officers to his accomplice's home. They proceeded to accused No 2's home

but did not find him. The appellant requested that he be taken to his family to inform them of the episode. Upon their arrival he became rebellious which necessitated the police to put him back into their van.

[10] The police took the complainant to the Police Station and thereafter to Manne Dipico Hospital where she slept overnight and was examined in the morning. The medical report (J88), which was completed by Dr N Strampe, was handed in evidence by consent. It showed that the complainant had superficial laceration to her labia majora and labia minora.

[11] The Magistrate found that the appellant contradicted himself in a number of material respects which she painstakingly highlighted in her judgment. In the overall, she reasoned that the two accused were clutching at straws. They colluded and acted with a common purpose to haul the complainant to the deserted house in order to have intercourse with her. She rejected their evidence as false insofar as it was contradicted by the evidence adduced by the State.

[12] The Magistrate had an in depth regard to the interest of the society, the offence, and the appellant and his co-accused's personal and mitigating circumstances. She noted that the appellant and accused No 2 were in their mid-twenties, 26 and 24 years old, respectively, at the time of the commission of the offences; they did odd jobs prior to their arrest; they were involved in romantic relationships with other women and had dependents which they had no contact with. The appellant had a previous conviction of assault with the intention to cause grievous bodily harm dated 19 April 2000 and was sentenced to R500.00 fine or 100 days imprisonment which was wholly suspended on certain conditions; on 02 July 2004 he was convicted of assault and was cautioned and discharged; on 03 November 2004 he was convicted of escaping or attempting to escape and robbery for which he was sentenced to nine years direct imprisonment. The Magistrate labelled the appellant and his co-accused's previous convictions: "*A worrisome testimony of their lives on earth.*"

[13] The Magistrate further considered that the appellant had been in prison awaiting his trial from 17 September 2010 to 03 July 2012 which, she remarked, the State could not be blamed for because the trial had been postponed several times at

the behest of the appellant and his co-accused. The Magistrate was of the view that they failed to show any contrition and instead lied to the Court that the complainant had visited them in prison where she recanted on her accusation that she was raped which resulted in her being recalled to once more testify.

[14] The Magistrate noted that although the complainant did not receive counselling it appeared that she suffered some psychological scars. She was of the view that the appellant and his accomplice posed a serious danger to society which required protection from them. On the whole, she found that there were no substantial and compelling circumstances which required deviation from the imposition of the prescribed sentences.

[15] What arises for consideration in this appeal is whether the Court *a quo* misdirected itself in finding that there were no substantial and compelling circumstances justifying a deviation from the imposition of the prescribed sentence of life imprisonment and/or whether the sentence imposed is shockingly harsh and inappropriate.

[16] Mr Steynberg contended that the Court *a quo* erred in not attaching weight to the fact that the complainant did not suffer any serious injuries during the commission of the offences. He submitted that although the absence of physical injuries does not in itself amount to substantial and compelling circumstances it is a factor to be taken into account in determining an appropriate sentence.

[17] Mr Steynberg further submitted that the appellant is terminally ill and attempted to commit suicide while in prison awaiting his trial; that this was his first contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007; that the Magistrate erred in overemphasizing the appellant's lack of remorse; that the appellant's personal and mitigating circumstances considered cumulatively justify a deviation from the imposition of life imprisonment. Lastly, he submitted, that at the age of 29, when the appellant was sentenced, he was relatively youthful. Therefore, the sentence of life imprisonment was severe and left no room for rehabilitation.

[18] In *Director of Public Prosecutions v Mngoma*¹, the SCA restated the well-established principle as follows:

'[11] The powers of an appellate court to interfere with a sentence imposed by a lower court are circumscribed. This is consonant with the principle that the determination of an appropriate sentence in a criminal trial resides pre-eminently within the discretion of the trial court. As to when an appellate court may interfere with the sentence imposed by the trial court, Marais JA enunciated the test as follows in *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (20) SA 1222; [2001] 3 All SA 220) at 478d-g:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate.'

[19] Ms Lesinda Grootboom, a probation officer, testified during the sentencing phase on her report in respect of the appellant. She highlighted that the appellant informed her that he attempted to commit suicide while in prison; that he was terminally ill and on chronic medication; that his family was unaware of his sickness. In her report she pointed out that Sister Moyo, a nurse in the service of the Department of Correctional Services, could not confirm the ailment because the appellant was not present on two occasions (twee kontak geleenthede). Nevertheless he is receiving medical treatment. According to the

¹ 2010 (1) SACR 427 SCA at para 11

probation officer a provision would be made for the appellant to continue receiving medical treatment in prison in the event he was sentenced to direct imprisonment.

[20] The manner in which the appellant and his co-accused went about perpetrating the offences paints a sordid picture of their perceived entitlement to act with indifference and in total disrespect of those around them. They both confirmed that there were other people in the street, where the incident took place, amongst them were: Bukelwa, Jonathan, and Kaaitjie. Accused No 2's mother is also said to have been present. They were undeterred by this. The appellant quite brazenly stated that he did not care that other people could see him having intercourse with the complainant save for his own girlfriend. In my view, this is a display of a complete disregard for the law and the consequences flowing from his action.

[21] The J88 medical report shows that the complainant was 16 years old; she weighed 43 kg and stood 144 cm tall. According to the victim's impact report she is a quiet and disciplined child and was at some stage withdrawn following the gang rape. She was defenceless and posed no threat to the appellant. Her scream during that fateful evening as described by Jonathan (Nosi) Gqedyua: *"Los my, los my...hoe Here help my, Here help- los my uit asseblief, ek wil huis toe gaan"* is extremely disturbing. She was dragged to a desolate place and gang raped. She tried to escape but was held captive by the rapists. These are serious aggravating circumstances. The absence of any physical injuries on the body of the complainant does not ameliorate the gravity of the offence. The Magistrate was alive to this. It is as well to remember that the appellant used a stone to subdue the complainant. She stood no chance against the two men. Therefore, the argument of lack of physical injuries cannot avail the appellant.

[22] In his lifetime the appellant amassed four previous convictions involving dishonesty and violence. He did not learn from his previous brushes with the law. Surely he cannot be a good candidate for rehabilitation. Insofar as it was argued on his behalf that at the age of 29 he was youthful, a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that

his immaturity can operate as a mitigating factor.² He failed to demonstrate this.

[23] The appellant posed a danger to the society as correctly found by the Magistrate.

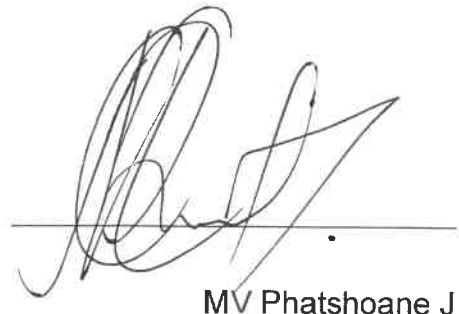
In *S v Lister*³ the Appellate Division remarked:

“To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence.”

[24] Nothing stands out in the appellant's personal and mitigating circumstances as constituting substantial and compelling circumstances justifying a departure to the imposition of the prescribed sentence. Indeed nothing induces any shock in the sentence of life imprisonment imposed by the Magistrate. Concomitantly, the appeal must fail. In the result I make the following order.

Order

1. The appeal against the sentence of life imprisonment is dismissed.



MV Phatshoane J

Pakati J concur in the judgment of Phatshoane J

² *S v Matyityi* 2011 (1) SACR 40 (SCA) at 47 para 14

³ 1993 (2) SACR 228 (A) at 232g – h

APPEARANCES:

FOR THE APPELLANT: Adv H. Steynberg
Instructed by Legal Aid South Africa.

FOR THE RESPONDENT: Adv J.J. Rosenberg
Instructed by the Director of Public Prosecutions, Northern
Cape.