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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A627/2015

DATE OF APPEAL: 9 FEBRUARY 2017

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between

JERRY RAFATLEMA

Appellant

Versus

THE STATE

Respondent

JUDGMENT

MADIMA, AJ

[1] The appellant faced four counts of rape, one count of kidnapping and another of theft in the Pretoria Regional Court. He was found guilty on all counts. On 23 April 2010

he was sentenced to a cumulative life sentence. The appellant's application for leave to appeal on 13 October 2011 was refused. He is before us in terms of s309 (1) (a) of the Criminal Procedure Act, Act 51 of 1977. The relevant section provides for an automatic right to appeal against both conviction and sentence where a life sentence has been imposed by a court *a quo*.

[2] The brief background to this matter is as follows. The complainant is from Tafelkop in Limpopo Province. She was 17 years of age at the time of the incident and had just completed matric. On 31 January 2009 she was in Mamelodi East visiting her brother, G. She was in Pretoria to register at the Tshwane University of Technology to upgrade her matric which she had not passed as well as she would have wished.

[3] On that fateful day the complainant was walking along a railway line on her way to Magugu Valley. She met with the appellant, then a 29 year old man, coming from the opposite direction. The time was about 14:00. The appellant greeted her. She acknowledged him. He ordered her to stop. She did not. He grabbed her by her trousers around the waist. He ordered her not to make any noise. He told her that she had a nice body and forced her to accompany him into bushes nearby. He informed her that he could kill her if she did not co-operate. He was not scared of anyone.

[4] When they reached a secluded spot, the appellant undressed the complainant, then himself. He ordered her to lie on her back and raped her. He did not use a condom. The complainant suffered several injuries on her back and buttocks, as the ground upon which she was ordered to lie was rough and had small stones. The appellant also strangled her and bit both her breasts during the sexual assault. When he was done he apologized. He told her that his mother had been raped in the exact same spot. She did not respond. The appellant then took R10.00 from her jeans pocket.

[5] The appellant instructed the complainant to accompany him to his home. They boarded a taxi which had other passengers inside. She did not tell anyone in the taxi about her predicament. Upon their arrival at the appellant's home, he introduced her to his mother. The appellant's mother appeared to like her and invited the complainant to pay her a visit again. The appellant occupies a backroom at his mother's house. It was in his room that the appellant raped the complainant three more times, again without a

condom.

[6] The complainant managed to escape from the appellant's room at about 22:00. She took the sum of R9.00 that was next to the bed to pay for her taxi home. There were no taxis on the streets at that time of night. She flagged down a vehicle that was passing by. When she got home she did not tell her brother what had happened to her, save to tell him that she had been kidnapped. She was too afraid to tell him that she had been raped. The next morning she related the whole saga to one S T ("T"), a tenant in the same house as her brother. T called her brother who had by that time already left for work. They both took the complainant to the police station and later to the hospital.

[7] T's evidence corroborated that of the complainant. T testified that she had seen the injuries sustained by the complainant on her neck, back and breast. The J88 also confirmed the complainant's injuries.

[8] The findings contained in the J88 were consistent with first time penetration of a vagina, specifically in that the hymen was not intact and there was visible scarring inside her vagina.

[9] In his defence the appellant testified that he had met with the complainant on the day in question. He proposed love to her, she accepted and they fell in love. They ended up at the appellant's place of residence. He introduced the complainant to his mother. He never raped her. The sex between them was consensual. The appellant denied kidnapping the complainant as well as robbing her of R10.00. Sometime during the course of that evening the complainant left and went home by taxi. He also denied that they had intercourse in the veld.

[10] The appellant's mother testified in his defense. She stated that the appellant arrived home with the complainant. He introduce the complainant as his girlfriend and the complainant did not deny that fact. The conduct of the complainant never raised any suspicion with her and she appeared comfortable. The mother invited the complainant to come and visit again.

[11] The appellant testified that he did not know what caused the injuries of the

complainant recorded on the J88. He stated that when she left his house she did not have those injuries.

Grounds of appeal

[12] The appellant submitted that the court *a quo* was wrong in convicting him. He laments the fact that the court was not sufficiently cautious when evaluating the evidence of the complainant, who was also a single witness. The court also did not take into account the contradictions and improbabilities in the State's case. The appellant further submitted that the court should not have convicted him in the absence of *viva voce* evidence of the J88 record.

[13] The appellant submitted further that the court failed to apply the test of dealing with two mutually destructive versions. The court ought to have found the evidence of the appellant reasonably possibly true.

Was the evidence of the complainant substantially satisfactory in every material respect?

[14] The appellant made much of the fact that the complainant was a single witness. He relied on **S v Mahlangu and Another 2011 (2) SACR 164 (SCA)** where **the court held that:** *"Section 208 of the Criminal Procedure Act 51 of 1977 provided that an accused may be convicted of any offence on the single evidence of any competent witness. The Court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration"*.

[15] The appellant submitted further that there were contradictions and improbabilities in the complainant's evidence. Some of these are the following:

He instructed me to stop which I did not do. He came from my back (sic) following me and I kept on walking, I did not stop. He grabbed me with trousers [indistinct] and after that he whispered in my ear telling me that I must not make noise. After that he told me that I have a nice body and he like (sic) my body".

When did he now tell you he liked your body, when did this happen now?

The first time I bumped to him, he greeted me. That is before he can pass me and make a U-turn. He greeted me and told me that he is ..[indistinct]...by my body. So he had a conversation with you:---- Yes

[16] I find no contradiction in the evidence of the complainant. The evidence of the complainant is clear when viewed in the context of all of the other evidence led. The complainant was walking. She met the appellant. He stopped her. She continued walking. He told her she had a beautiful body. Whether theirs was a full blown conversation is neither here nor there. The appellant threatened her. He told her he was not afraid of anyone. No one would help her even if she tried to solicit such help from them.

[17] The appellant submitted that the complainant also contradicted herself in her evidence regarding the incident in the bushes when she testified that:

Reason being that I was scared even if when we were at the bushes he was picking up stones, throwing them at me

No he was just holding it, scaring me (sic) that he will throw me (sic), but he never did.

The contradiction raised by the appellant is not material and does not impact on the totality of the evidence regarding the sexual assault.

[18] The complainant is also said to contradict herself on the number of times she was raped. The J88 record states that the complainant reported to the medical practitioner that she was raped twice, once in the bush and another time in the house.

The patient was apparently sexually assaulted twice in the bush and at the home by the perpetrator.

[19] The court *a quo* did not have the benefit *viva voce* evidence of the doctor who examined the complainant. The inscription the J88 is not clear. In the absence of *viva*

voce evidence it is possible that the complainant could have told the medical practitioner that she was sexually assaulted at two separate locations, namely the bush and the home, or that she was raped twice. I am satisfied that it is not an indication that the complainant contradicted herself.

[20] The complainant is also accused of not fleeing from the appellant, or to alert the bystanders about her situation when an opportunity to do so availed itself.

But they could have heard you if you screamed? -----Yes

Okay, so why did you not run then?---- I did not run because we were in the field and when I looked down I was scared to fall. It is the reason why I did not run.

Okay. Now madam when you got into the taxi, you had not seen a knife or any gun at that stage from the accused. Why did you not alarm the people there and say you are being forced into the taxi, they must help you? -----I was scared and that never crossed my mind as the accused told me that even if you tell somebody else they will not do anything and secondly I was feeling pains.

*Okay when you spoke to his mother, were you friendly with the mother? --- That is correct. And you were then friendly with the mother? ----- Yes
And you were acting as if you were his girlfriend? ----- Yes*

So you only found your brother? --- Yes and he asked me where I was coming from. I told him that the one guy kidnapped me, but I managed to escape without hi doing anything to me.

And why were you lying to your brother? --- I was scared at that time. Then I told myself I was not going to tell anybody what happened.

[21] I am in agreement that certain parts of the evidence of the complainant seem improbable. For example, the complainant, after the sexual assault in the bush, boarded a taxi with the appellant. The taxi had other passengers inside. She did not raise the issue of her predicament with fellow passengers. She testified that it did not cross her mind. The complainant also did not tell her brother that she was raped; only that she

was kidnapped. Further the complainant did not tell the appellant's mother that she was being held by her son against her will. It must be borne in mind that the complainant was 17 years of age going on 18. This was her first sexual encounter. She was afraid. Her account of the events and her responses to the sexual assault might have been related better by someone older and wiser to the world. She was not. This on its own does not make her evidence substantially tainted.

[22] The J88 was also a source of complaint by the appellant. He submitted that the court rejected the evidence of the appellant solely because of the J88 which set out the injuries sustained by the complainant.

Looking at the evidence of the complainant it is the finding of this court that there is indeed some corroboration for how she was being raped and being against her consent and that is being corroborated by the JBB medical report.

The JBB without reemphasising its content is very clear that the complainant suffered serious injuries and that leads me to the following conclusion. The version of the accused is accordingly rejected.

[23] The report of the J88 which recorded the injuries sustained by the complainant corroborates the complainant's version that she was sexually assaulted. The appellant denied that the complainant sustained any injuries on her back, neck and breasts, whilst she was in his company. He specifically testified that the complainant did not have these injuries when she left his home. If the appellant's version is to be believed this means that the complainant endure another sexual assault between 22h00 and the next morning when she reported the incident to T. The injuries on the complainant's back and buttocks are consistent with lying on the ground in the veld. The injuries on her back, buttocks, neck and the bite marks on her breasts corroborates her evidence and are not consistent with the appellant's version of events.

[24] The J88 record, as already alluded to above, corroborates the complainant's evidence. The complainant testified that the sexual assault was for her, the very first sexual encounter. The J88 record was consistent with intercourse for the first time. I am aware of the Supreme Court of Appeal's dim view of uncorroborated J88 reports.

In **S v MM 2012 (2) SACR 18 (SCA)** the Court found that *"As appears to be an increasing feature of cases such as these, the doctor's report was simply handed in by consent and the doctor was not called to give evidence. That practice is, generally speaking, to be deprecated. It means that there is no opportunity for the doctor to explain the frequently subtle complexities and nuance, of the report, to clarify points of uncertainty and to amplify upon its implications and the reasons for any opinion expressed in the report. That may make the difference between a conviction and an acquittal, or perhaps a conviction on a lesser charge. Depending on the area where there is a lack of clarity, the lack of clarification may either benefit or prejudice an accused. Neither result is desirable. Magistrates and judges who are confronted with these reports, without explanation, do not have the requisite medical knowledge to flesh out their full implications. Unless therefore there can be no confusion, for example, in a case where the fact of rape is admitted and the only issue one of identification of the perpetrator, it will generally be desirable for the doctor to give evidence in Support of his or her report."* **Every case should be dealt with on its own merits.**

[25] The complainant is also criticized because she did not make any attempt to escape from the appellant when she had ample opportunity to do so. Her response was that she was scared of the appellant. He had threatened to tie her down on the railway line and also kill her if she did not co-operate. There is no reason to disbelieve her in this regard. It was only when she was certain she could get away from him without being detected that she did.

Do some or all of the above indicate that the complainant was a willing and consenting participant?

[26] If the complainant was a willing and consenting participant then why did she report the kidnapping and the rape to T. It is understandable why she did not report the rape to her brother. Regard must be had to the fact that the complainant was only 17 years at the time. She was new to the city. She had just arrived from the rural areas. She was scared to tell her brother the fate that befell her. There is no reason she would make it up. She was however more comfortable reporting her ordeal to another female, T. If she had not been raped, but had voluntarily had sex with the appellant, she could simply have kept quiet and nobody would have known, especially her brother.

[27] The appellant's sole defence is that the sex between him and the complainant was consensual. Additionally their encounter was at his home and not in the bush as claimed by the complainant. The appellant has no explanation about the bruises sustained by the complainant. He alludes to the fact that the complainant sustained the injuries after she had left his home that night. The evidence of the appellant's mother does not take the matter further. At most her evidence is an account of what she witnessed between her son and the complainant.

[28] The court *a quo* was faced with two mutually destructive versions. Where there are two conflicting versions, the court held in **S v Dangazela 2010 JOR 0577 (SCA)** at **paragraph 12** that *"in such circumstances, apart from considering the credibility and reliability of the witnesses, it was justified in assessing the probabilities of the two versions and to reach a finding as to which one is true and which one is not. It could of course only dismiss the defence version as false in the event that it reached that conclusion beyond reasonable doubt. And it had to do so after giving consideration to the evidence before it as a whole."* In **S v Schackell 2001 (4) SA 1 (S A)** the Court stated that *"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."*

[29] The court *a quo* found was alive to the precautionary rules to be applied as far as a single witness is concerned. The court found that the complainant testified in a clear and eloquent manner and that she gave a clear account of the rapes. The court held that she was a truthful and credible witness. The court *a quo* observed that if one looks at the size of the complainant against the size of the appellant that the complainant was in a "very vulnerable position" and that she "felt scared and threatened". The court correctly found corroboration for the complainant's evidence in the undisputed J88 report. In my

view the findings of the court a *quo* cannot be faulted. The findings were based on the evidence before it, especially the record in the J88.

[30] In my view the court a *quo* was correct in rejecting the appellant's version. The appellant's version is far-fetched in the extreme. His evidence is found wanting in several respects.

Sentence

[31] That rape is a serious crime cannot be overemphasized. It does not seem that those who rape others are alive to the seriousness of this very invasive of infractions. In ***S v Chapman 1997 (3) SA 341 (SCA)*** the court held as follows regarding the seriousness of rape

"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 and to any defensible civilization. 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 tranquility of their homes without fear, the apprehension and insecurity which constantly diminishes the quality and enjoyment of their lives. The Courts are under a duty to send a clear message to the accused, other potential rapists and the community: we are determined to protect equality, dignity and the freedom of all women, and we shall show no mercy to those who seek to invade those rights"

[32] The appellant submitted that the sentence of life imposed on him is disturbingly inappropriate to the crime he committed. It was submitted that the court a *quo* did not properly inform him that the minimum sentence of life was applicable to him. Further that his personal circumstances were not seriously taken into account. Importantly the court failed, so it was submitted, to apply the determinative test as set out in ***S v Malgas-2013 (2) SACR (SCA)*** where it was held that *"A Court exercising appellate jurisdiction can at, 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 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. This however does not mean that an appeal court is precluded from interfering with sentences imposed by a trial court in the absence of a material misdirection. Indeed the appeal court may do so when the disparity between the sentence of the trial court and the sentence which the appeal court would impose had it been the trial court is so marked that it can properly be described as shocking, startling or disturbingly inappropriate.

[33] In **Director of Public Prosecutions, Western Cape v Prins 2012 (2) SACR 183 (SCA)** at p 186 paragraph 1, Wallis JA writing for the majority held that "*No judicial officer in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children, to grow up in innocence and, as they grow older, to awake to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone.* Women are not free to walk the streets of their country without fear of assault by predators lurking in the shadows. It is not safe for them to walk alone even during the day. It surely is a chilling and sobering thought that women walk in fear of being violated anytime they take a walk to the nearby corner shop.

[34] In **S v C 1996 (2) SACR 182 (C)** the Court held that "*A rapist does not murder his victim - he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life a fate often worse than loss of life.*" The complainant shall forever carry with her the knowledge arising from the event of that fateful day. It is not unreasonable to pine that each and every time the complainant is intimate with a man, the tape of her rape will play in her subconscious. As stated in *S v C supra*, her fate is worse than death itself.

[35] The Court in **S v Ncheche 2005 (2) SACR 386 (W)** held that "a woman's body is

sacrosanct and anyone who violates it does so at his peril and our legislature, and the community at large, correctly expects our courts to punish rapists very severely." Is the life sentence disproportionate to the four rapes, a kidnap and theft? Are there substantial and compelling circumstances that warrant a deviation from or an interference with the sentence imposed by the trial court?

[36] The courts have on numerous occasions held that the imposition of a sentence on accused persons is always in the discretion of the trial court. A court of appeal may only interfere if it finds that the sentence has not been judicially and properly exercised. See *S v Rabie 1975 (4) 857 (A)*; *S v Salzwedel and Others 1999 (2) SACR 586 (SCA)*. In *S v Rabie, supra* the Court held that *"In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal should (a) 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". The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.*"

[37] Can the appellant be rehabilitated? Of concern to me is the fact that the appellant has not shown any remorse. Contrition can only come from an appreciation and acknowledgment of the extent of one's error. *S v Nkunkuma and Others 2014 (2) SACR 168 (SCA)* at p175 paragraph 14 referring in part to *in S V Matyityi 2011 (1) SACR 40 (SCA)*. In *S v Dyantyi 2011 (1) SACR 40 (ECG)* paragraph 25 the Court found that an accused will rarely be able to show that he is a suitable candidate for rehabilitation without proving to the Court that he is genuinely remorseful.

[38] The appellant's defence was that the sexual intercourse with the complainant was consensual in the midst of overwhelming evidence against him. Although the appellant apologised to the complainant after the rape in the bush, he took her home with him and raped her again. This is not conduct consistent with a remorseful person.

[39] Did the court *a quo* misdirect itself when it imposed the life sentence on the appellant? Trollip JA in *S v Pi/lay 1977 (4) S 531 (A)* at 535E-F described **misdirection as entailing** ".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 misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. I see no misdirection on the part of the trial court in the imposition of the life sentence. It is similarly my view as the court held in S v Khumalo 1973 (3) Sa 697 (A) at 6 BA, that "Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."

[40] It is the function of the courts to protect society, especially women and children. The question of retribution, deterrence, and the prevention of crime as well as the protection of the community at large cannot be overlooked in passing an appropriate sentence. I am satisfied that the trial court had regard to all of the relevant factors when it passed the sentence. I take my cue from **S v Motlounj 2016 (2) SACR 243 (SCA)** where the Court held that *"it could only do so when there was a material misdirection by the sentencing court. But it may interfere with the exercise by the sentencing court of its discretion, even in the absence of a material misdirection, when the disparity between the sentence imposed by the trial court and that which the appellate court would have imposed, had it been the trial court, was so marked that it could properly be described as shocking, startling or disturbingly inappropriate."*

[41] I find the sentence imposed by the trial Court not shocking, not startling or disturbingly inappropriate. On the contrary the sentence imposed fits the crime and will send a clear message to all would be rapists.

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

1. The appeal against conviction and sentence is dismissed.
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**TS MADIMA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I concur, and it is so ordered

**L WINDELL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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Dates of Hearing:
Date of Judgment:

9 February 2017
9 March 2017