



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT KIMBERLEY)**

Case number: **CA&R 97/15**
Date heard: **26/06/2017**
Date delivered: **30/06/2017**

In the matter of:

JAMES DAVID MATROOS

APPELLANT

and

THE STATE

RESPONDENT

Coram: Williams J et Snyders AJ

JUDGMENT

SNYDERS, AJ

1. The appellant was convicted of rape and murder in the Regional Court, Richmond on 20 March 2013. He was sentenced to two terms of life imprisonment and now appeals against the convictions and sentences imposed.

2. The appellant was charged with raping and murdering the 16 year old deceased on 13 February 2010.
3. The appellant pleaded not guilty to both charges and provided a detailed statement in terms of s 115 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The contents thereof will not be repeated here, save to indicate the pertinent aspects on which his defence rested:
 - 3.1 The appellant and the deceased were in a relationship;
 - 3.2 The appellant and the deceased had consensual intercourse on the day in question;
 - 3.3 The deceased fell out of the mini bus taxi when the door slid open whilst the appellant was executing a u-turn.
4. The deceased's friend, Trishia Lottering, testified that the appellant and deceased were acquainted with one another. The deceased introduced the witness to the appellant and also sat next to him when they drove to buy a coldrink. After purchasing the coldrink, the deceased, her friends, the appellant and another gentleman drove to a different spot to drink the coldrink. However, as soon as everyone alighted from the vehicle, the appellant drove away at high speed with the deceased still in the vehicle. The witness did not know where the appellant and deceased were going.
5. The pathologist, Dr Walraven, testified to the deceased's injuries. Her testimony directly contradicted the basis of the appellant's defence. The extensive bruising of the pelvic wall, the long tears in the vagina and the 4cm tear on the vaginal fornix were all indicative of a violent rape. The pathologist further testified that these injuries would have caused the deceased to be hysterical with pain. The pathologist's conclusion of a violent rape was supported by the excessive vaginal

bleeding that was testified to by the professional nurse and the attending doctor in De Aar.

6. The deceased suffered a brain injury. The pathologist testified that the injury was typical of a motor cycle accident. Alternatively, it could have been caused by blunt force trauma that was applied while the head was supported. By explanation, if the deceased were kicked in the head while the head was in contact with the floor.
7. The deceased had some abrasions on her body. A fall from a fast moving vehicle would have caused more abrasions than those present on the deceased. Conversely, a fall from a slow moving vehicle would not have caused the skull fracture. The pathologist thus ruled out consensual intercourse and falling from a motor vehicle, regardless of speed.
8. The appellant elected to remain silent. The Constitutional Court stated the following in *S v Boesak*:¹

"The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an appellant has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an appellant person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an appellant person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the appellant. Whether such a conclusion is justified will depend on the weight of the evidence. "

¹ 2001 (1) SARC 1 CC at para 24

9. Thus, although the appellant does not bear the onus, there are consequences attached in remaining silent. The Magistrate correctly evaluated the evidence before her in coming to a decision. The proper approach by for such evaluation was set out as follows in *S v Chabala*:²
- "The correct approach is to weigh up all the elements which point towards the guilt of the appellant against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the appellant's guilt."*
10. There are no grounds before me to set aside the conviction herein, as the Magistrate had correctly found the state to have proven its case beyond reasonable doubt.
11. In *S v De Jager and Another*³, the Appeal Court postulated as follows regarding interference with a sentence imposed by the trial court:
- "It would not appear to be sufficiently recognised that a court of appeal does not have a general discretion to ameliorate the sentence of trial courts. The matter is governed by principle. It is the trial court which has the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentences passed and that which the Court of Appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited."*
12. From the record, it is evident that the Magistrate had taken into account and fairly balanced the appellant's personal circumstances, the

² 2003 (1) SACR 134 SCA at para 15

³ 1965 (2) SA 616 (AD) at 628 H – 629 (A)

prevalence and seriousness of the crimes and the interests of the community in determining a suitable sentence.

13. The appellant raises the following factors, which Mr Van Tonder for the appellant argued would cumulatively constitute substantial and compelling circumstances:

- 13.1. He was 26 years old when he committed the offences;
- 13.2. He was unmarried and had 3 minor children;
- 13.3. He completed grade 11 in school and worked as a taxi driver for R4 000.00 per month;
- 13.4. He was a first offender;
- 13.5. The form of intention he was found guilty of was *dolus eventualis*;
- 13.6. He spent approximately 3 years in custody awaiting finalisation of the trial.

14. In considering the appropriate sentence, the Magistrate took into account the fact that the rape consisted of penetration with a penis, as well as an other object. The Magistrate erred in finding this to be the only reasonable inference to be drawn based on the pathologist's testimony. However, the absence of penetration by an object does not detract from the brutality of the rape. The Magistrate also erred in finding that the delay in finalising the matter was the fault of the appellant and his first attorney. It is clear that a number of postponements were at the instance of the state as well.

15. That being said, cumulatively, the circumstances raised by the appellant do not constitute compelling and substantial circumstances to justify a deviation from the prescribed sentence. As set out in *S v Malgas*⁴:

⁴ 2001(1) SACR 469 (SCA) at 470 D – 471 G

"The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained."

16. Based on the above, I find that the Magistrate correctly convicted and sentenced the appellant.

Wherefore I make the following order:

- 1. The appeal on both the convictions and sentences is dismissed.**



J.A SNDYERS
ACTING JUDGE

I concur



C.C WILLIAMS

JUDGE

On behalf of Appellant: Mr A Van Tonder (Legal Aid)

On behalf of Respondent: Adv. K Ilanga (DPP)