



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

HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: CA&R 0 1/16

Heard: 09 May 2016

Delivered: 13 May 2016

In the matter between:

**WILLEM ESAU
ANTHONEY JONKERS
NICKEL STEYNER**

**1st Appellant
2nd Appellant
3rd Appellant**

v

THE STATE

Coram: Kgomo JP et Phatshoane J

JUDGMENT

KGOMO JP

1. The three appellants were convicted on 13 December 2010 by the Regional Magistrate, Ms S Tsotsa, sitting in Upington, of the rape of Ms P on 02 June 2006. Each one was sentenced to 15 years imprisonment. The charge sheet informed them that sections 51(2), 52(2), 52(a) and (b) of the Criminal Law Amendment Act, 105 of 1997, are invoked against them.

2. The appellants applied unsuccessfully for leave to appeal against both their convictions and sentences. Leave in respect of sentence only was granted by this Court on petition.

3. Mr P J Cloete, for the appellants, stated that it is not their case that the Regional Magistrate imposed an incompetent sentence. The punitive jurisdiction of a Regional Court is prescribed as follows in the Criminal Law Amendment Act, 105 of 1997:

“51. (2) Notwithstanding any other law but subject to subsections (3) and (6) a Regional Court or a High Court shall sentence a person who was convicted of an offence referred to in—

 - (a) Part II of Schedule 2, in the case of—*
 - (i) a first offender to imprisonment for a period not less than 15 years;*
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;*
 - (b) if it has convicted a person of an offence referred to in Part 111 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.”*

4. In **S v Khoza** 2010 (2) SACR 207 (SCA) at para 88 the SCA held that a Court is not tethered to a minimum sentence, and stated:

“[88] Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 prescribes in the case of first offenders, a minimum sentence of 15 years' imprisonment for certain offences, inter alia, robbery with aggravating circumstances and unlawful

*possession of machine guns or rifles. A court may impose a lesser sentence if there are substantial and compelling circumstances. The court a quo correctly found such circumstances did not exist in this case. **It further held that the minimum sentence was, in view of the seriousness and aggravating nature of the offences, too lenient and accordingly imposed the sentences referred to in paras 86 and 87 above.*** Which sentences are in excess of the prescribed minimum sentence.

5. It is common cause between the state and the defence that only the First Appellant, Willem Esau, 25 years old, had sexual intercourse with the complainant. As it turned out, he falsely pleaded consent. The Second and Third Appellants disassociated themselves from the rape, for different reasons, but were, as it were, correctly convicted as accomplices to the rape.
6. The appellants' counsel, disappointingly, seems to take the view or the approach that the facts or the merits of the case are immaterial. He has in consequence only dealt with what he deems to be the mitigating factors that would redound to the benefit of his clients. Counsel also does not seem to have any qualms with the fact that the Magistrate has not drawn any distinction in the sentence of Willem Esau, who had penetrative rape with the complainant, and the other two who facilitated it.
7. It is unacceptable for a Regional Magistrate to quote authority or from a legal reference book without providing the full citation, which should include the page number. It makes it extremely difficult to check the veracity of the extract. Counsel did not assist either. Nevertheless, the Magistrate, in her non-differentiation of the sentences, which we located with the aid of the senior researcher, quoted the following passage from the author J M

Burchell, South African Criminal Law and Procedure, Volume 1 (General Principles of Criminal Law), Third Edition, p327:

D. Punishment of Accomplices

“The appropriate sentence to be imposed on an accomplice will depend on the extent of the accomplice’s participation in the crime. Although the accomplice will usually play a more limited role in the commission of the crime than the principal offender and so receive a lighter punishment than the principal offender, it is possible that the accomplice may, in fact, play a more substantial role in the preparation and execution of the crime than the principal offender and so receive a more severe punishment than such an offender. Of course, the extent of the participant’s role in bringing about the unlawful consequence will also be relevant to the inquiry whether the participant is, in fact, a perpetrator, in the first place, or an accomplice.”

8. The facts were briefly as follows. The complainant and her lady-friends drank liquor at a local tavern. The Third Appellant proposed love to her several times but she rebuffed his advances. Mr Elton Bloem, who showed concern for the complainant, suggested that he escort her home but she declined. The Third Appellant suggested to Bloem that they should abduct the complainant and rape her. Bloem refused. Having given up on the complainant Bloem left her at the tavern and went home.

9. At around 23h00 the complainant left the tavern alone and was pounced on by the three appellants. She resisted by fighting them off and screaming. All her efforts were in vain. The appellants abducted her to a secluded spot where they undressed her. The First Appellant raped her vaginally whilst she laid on the ballast stones. The Second and Third Appellant held her down as she refused to submit. Thereafter the Third Appellant placed the

complainant on her knees, undressed himself and was poised to penetrate her from the rear when the police struck and apprehended them on the scene.

10. The intervention by the police was thanks to Mr Jack Esau, the uncle to the First Appellant, Willem Esau, who summoned them in light of the unseemly episode that unfolded before his eyes.
11. The evidence established that the complainant was dragged and carried whilst facing where the abductors and the victim came from to disorientate her. Because she resisted she was assaulted several times. At one point the First Appellant asked for a knife from his accomplices and threatened to stab her if she did not cooperate. This ill-treatment has traumatised the complainant severely. The Appellants denied their foul deeds even in the face of having been caught red-handed (in *flagrante delicto*) and notwithstanding the overwhelming evidence against them. They therefore have shown no remorse or contrition. If it was not for the quick-thinking and civic duty of Mr Jack Esau and the prompt reaction of the police the plight of the complainant would unquestionably have been much worse.
12. The appellants' counsel have captured their personal circumstances as follows and contended that the Regional Magistrate misdirected herself by not finding that cumulatively they constitute substantial and compelling circumstances:
 - "12. *Eerste Appellant se persoonlike omstandighede volgens die rekord was die volgende:*
 - 12.1 *Hy was 25 Jaar oud tydens die voorval;*
 - 12.2 *Hy was werksaam as `n konstruksiewerker en het R80 per dag verdien;*
 - 12.3 *Hy het skool verlaat tot standerd 2 en moes die skool verlaat as gevolg van sy ouers se finansiële problem;*
 - 12.4 *Hy was ongetroud, maar in `n saamleefverhouding en het `n minderjarige seun;*

- 12.5 *Hy was vir 5 maande in hegtenis nadat hy skuldig bevind is en voordat hy gevonnissen is;*
 - 12.6 *Hy is nie 'n eerste oortreder nie, maar sy vorige veroordelings is 7 jaar terug gepleeg.*
 - 12.7 *Hy was tydens die voorval onder die invloed van drank en dagga.*
13. *Tweede Appellant se persoonlike omstandighede was die volgende:*
- 13.1 *Hy was 30 jaar oud tydens die voorval;*
 - 13.2 *Hy was ongetroud en was by sy oupa en oma woonagtig na wie hy ook omgesien het;*
 - 13.3 *Hy het gewerk as 'n skryfwerker en het 'n inkomste van R3500 per maand verdien;*
 - 13.4 *Hy het skolasie gevorder tot standerd 8 en het standard 9 voorgesit by die Upington College;*
 - 13.5 *Hy is 'n eerste oortreder;*
 - 13.6 *Hy was ten tyde van die voorval onder die invloed van drank en dagga;*
 - 13.7 *Hy was vir 5 maande in hegtenis verhoorafwagting.*
14. *Derde Appellant se persoonlike omstandighede is as volg:*
- 14.1 *Hy was 40 jaar oud tydens die voorval;*
 - 14.2 *Hy is ongetroud, maar was in 'n saamleefverhouding vir 22 jaar;*
 - 14.3 *Hy het 3 minderjarige kinders asook 'n meerderjarige kind;*
 - 14.4 *Hy was werksaam deur drank te verkoop waar hy R2500 tot R300 per maand verdien het;*
 - 14.5 *Hy was vir 5 maande verhoorafwagting in hegtenis.*
 - 14.6 *Hy het skolasie gevorder tot standard 8 en moes skool verlaat as gevolg van finansiële probleem;*
 - 14.7 *Hy was tydens die pleeg van die misdryf onder die invloed van drank en dagga;*
 - 14.8 *Die klaagster het nie ernstige beserings by haar privaatdeel opgedoen nie."*
13. The appellants were all adults (aged 25, 30 and 40 years, respectively). Their actions are gang-related. Counsel says the complainant has not sustained serious physical injuries to her genitalia, but it is the psychological scars that would endure endlessly.

14. First Appellant has 6 (six) previous convictions for offences committed between 2000 and 2004: Three for theft, two for housebreaking with the intent to steal and theft and one for assault. It must be borne in mind that the appellants were arrested on 02 June 2006. The meaning of this is that he does not have any long clean record between offences nor is there a superannuation of any.
15. The Second Appellant, Jonkers, is a first offender. The Third Appellant is treated as a first offender because his minor conviction for assault for which he was convicted in 1990 had superannuated by 2006. The Second and Third Appellants should have known better to refrain from their despicable conduct because they are much older than the First Appellant.
16. The Magistrate found that the appellants were not as intoxicated as they portrayed themselves to have been. Besides, at least as far as the Third Appellant is concerned, he had targeted the complainant long before she left the tavern and all indications are that the three of them had conspired to commit the illegal deed. The deed itself clearly stretched over some time during which they had the opportunity to think twice. Where does the intoxication then come in, one might ask?
17. In **S v Malgas** 2001(1) SACR 469 (SCA) at 478d-g the Supreme Court of Appeal stated:
"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.”’

18. I am not persuaded that the Regional Magistrate misdirected herself. She dealt carefully with all the issues raised by the defence and the state and underpinned her reasons for the sentences imposed with **S v Matyityi** 2011 (1) SACR 40 (SCA) which case in turn draws heavily on **S v Malgas** (*supra*) ; and as already alluded, she also invoked the comment of the author **Burchell** for purposes of imposing similar sentences on the appellants. The appeal must accordingly fail.

19. A word of guidance, though, to the Magistrate is this. Whereas she appropriately stated that the state bears the onus to prove an accused person’s guilt beyond a reasonable doubt she, nevertheless, commenced by examining the evidence of the accused/appellants before that of the state-witnesses. By adopting such topsy-turvy analysis a presiding officer may unintentionally be driven to the wrong outcome. It is preferable to deal with the facts which are common cause, followed by those found to have been proved; the state case may then be placed under the microscope. Having done so the court would be best placed to determine whether, in the last resort, the accused’s version is, as we say, reasonably possibly true. See **S v Chabalala** 2003 (1) SACR 134 (SCA) at 139i – 140b (para 15).

Order:

1. The appeal of all three appellants is dismissed.

2. Recommendation: It is recommended that the Provincial Commissioner of Police consider some form of recognition for Mr Jack Esau (**see para 10 of this judgment**) for coming to the complainants' rescue by summoning the police timeously and saving her from a further harrowing experience.

F DIALE KGOMO

JUDGE PRESIDENT

Northern Cape High Court, Kimberley

I concur.

V M PHATSHONE

JUDGE

Northern Cape High Court, Kimberley

Counsel:

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