

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

4/02/2015
DATE

[Signature]
SIGNATURE

4/2/15

CASE NO: A571/14

NKOSINATHI CHRIST NGWASE

APPELLANT

and

STATE

RESPONDENT

JUDGMENT

KHUMALO J

[1] The Appellant was convicted in the Regional Court for the Division of Gauteng held in Oberholzer on charges of kidnapping (count 1), assault (count 2) and rape (count 3) as defined in s 3 read with s 1, 55, 56 (1), 57, 58, 59, 60 and 61 of Act 32 of 2007 and read with s 92 (2), 94, 256, 257 and 281 of Act 51 of 1977 ("the act") and further read with s 51 (2) (b) and part III of schedule 2 of Act 105 of 1997 ("the Amendment Act"). He was sentenced to 5 years imprisonment on count 1, cautioned and discharged on Count 2 and 10 years imprisonment on count 3. The sentences were ordered to run concurrently. The Appellant was effectively sentenced to a period of 10 years imprisonment.

[2] With leave of the trial court he is appealing against both conviction and sentence. However at the commencement of the hearing of the appeal, Counsel for the Appellant conceded that the magistrate evaluated the evidence meticulously and with precision and therefore it cannot be argued that the magistrate misdirected himself. Appellant then withdrew its appeal against conviction.

[3] As against sentence Appellant appeals on the ground that his personal circumstances together with the following factors should have, cumulatively,

persuaded the trial court to impose a lesser sentence than the one imposed due to the fact that:

[3.1] the complainant did not sustain serious physical injuries;

[3.2] the victim impact report was not presented at court. It is not known how the rape affected the complainant, it is submitted therefore that this is not the worst kind of rape;

[3.3] there is no evidence that the Respondent is not amenable to rehabilitation;

[3.4] the appellant was assaulted by the members of the community before he was placed under the arrest by the police;

[4] The aforementioned factors were only raised on Appeal not in the trial court.

[5] It is trite that a pronouncement on sentence is within the trial court's province and such province is not to be interfered with unless exercised inappropriately and injudiciously. To determine if a sentence is appropriate *S v Rabie* 1975 (4) SA 855 (A) at 857D states that the test is whether the sentence is vitiated by irregularity or by misdirection or is disturbingly inappropriate.

[6] A misdirection is said to occur when the magistrate commits an error in determining or applying the facts for assessing the appropriate sentence which is what is Appellant's contention. However 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 termed one that vitiates the court's decision on sentence; see *S v Pillay* 1977 (4) SA at 535E-G.

[7] The facts upon which the Appellant was convicted were that on or about 17 March 2012 he came upon the complainant in the street, grabbed and dragged her to a nearby soccer field. The complainant was 16 years old at the time. He then instructed her to undress and when she refused he slapped her across the face, threw her to the ground and raped her. Thereafter he walked her through a passage and held her against the wall, preventing her from going home. She was found by the complainant's sister and a friend who dragged her away from the Appellant. The complainant was taken to hospital and the matter reported to the police. The members of the public apprehended, assaulted and handed Appellant over to the police, that is when he was arrested.

[8] In such instance where the Accused is convicted of rape the discretionary minimum sentence applies which is as read in s 51 (2) (b) and part III of schedule 2 of Act 105 of 1997 ("the Amendment Act") that provides that:

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High court shall sentence a person who has been convicted of an offence referred to in—

(b) Part III of Schedule 2, in the case of—

- (i) a first offender, to imprisonment for a period of not less than 10 years;
- (ii) a second offender of any such offence, to imprisonment for period not less than 15 years; and

[9] S 51 (3) reads:

“If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.”

[10] In addition to compliance with the aforementioned prescripts of the law the court's decision on what is an appropriate sentence must also be informed by the Zinn triad in *S v Zinn* 1969 (2) SA 537 (A), that requires a balanced consideration of the factors that relate to the personal circumstances of the offender, the crime and the interest of society whilst not losing perspective on the purpose of sentencing which is deterrence, prevention, retribution and rehabilitation. The length and nature of sentence must therefore reflect a consideration and a bearing to all these elements.

[11] In its deliberation on what was an appropriate sentence to impose upon the Appellant the court a quo took into consideration the following personal circumstances that were proffered on Appellant's behalf that he was 24 years old, employed as a builder earning R700 every 14 days, unmarried with a 2 year old child. He was assaulted by the public before he was arrested. He spent 2 years in custody awaiting trial. The court also at the same time acknowledged the prejudice that he might suffer as a result of the cumulative effect of the numerous sentences since he was convicted of several offences.

[12] The court then in its deliberation also looked at the abovementioned factors measuring them against the not so favourable factors in order to arrive at a balanced decision and also to determine if for the purpose of the schedule 2 offence there are substantial and compelling circumstances that justify deviation from the prescribed sentence. The court then took into account that the Appellant was a repeat offender. He has already served time for a previous conviction on a violent crime. He has been convicted of several crimes that also involve violence with one for which the court is implored to impose a prescribed minimum sentence. It also took into regard that the offences were of a serious nature, the prevalence of rape in our society, the indignity that the complainant suffered in the hands of the Appellant being barely 16, her vulnerability, the total disregard of her rights that Appellant displayed and of any respect to the community. All these factors played a decisive role in the determination of an appropriate sentence by the trial court. It found that when weighing them the personal circumstances of the Appellant, for the purpose of sentencing in the case of the serious crime of rape, are readily dominated by the aggravating circumstances, that the learned magistrate deemed it appropriate to impose the prescribed minimum period of 10 years imprisonment, finding no substantial or compelling circumstances to deviate. That was in line with the decision in *S v Vilakazi* 2009 (1) SACR 552 (SCA) par [58] that:

"In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background...But they are nonetheless relevant in another aspect. A material consideration is whether the accused can be expected to offend again,"

[13] The Appellant was in fact treated with a measure of mercy if the sentence is viewed from a perspective that the sentences were ordered to run concurrently with a sentence of another serious offence of kidnapping. The trial court actually did mention that it cannot overlook the aspect of mercy as a result all options were going to be carefully considered to determine the appropriate sentence. What must have come into the fore was the propensity of the Appellant to commit a violent crime. I find the sentence appropriate under the circumstances. What is more striking to me is the fact that the offence was committed in the glare of the public. Appellant was not deterred by the fact that somebody known to the complainant saw him dragging the complainant and her sister was probably going to be informed of the kidnapping. There were also police nearby and members of the community who were looking at an accident. He, regardless, went through with his intention and raped her, showing no respect to the complainant, her family and the public. The learned magistrate mentioned that society expects that we will show respect to each other. In this matter members of the public felt also disrespected and violated, that such a despicable crime can happen in their midst with such contempt as it was shown by their indignation. It is the reason why the late Chief Justice, Ismail Mahomed, stated in *S v Chapman* 1997 (2) SACR 3 SCA at 5d that:

"The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women and girl-children, and we shall show no mercy to those who seek to invade those rights."

The courts must strive to instill public confidence in the law and discourage anarchy and the ineffectuality of the rule of law. The public must never find a need to take the law into their own hands.

[14] The Appellant mentioned the victim impact report that was not submitted as one of the factors that could have swayed the magistrate to impose a lesser sentence. The victim impact report is not for the purpose of serving as a mitigating factor for the perpetrator and not statutorily required but discretionary. The fact that it was not called for cannot be used as a reason to benefit the offender to then receive a lenient sentence. The use of the reports as much as it can sometimes assist, it can also be a source of controversy. I find it irreconcilable with justice that an offender will receive a more lenient sentence on the basis that his chosen victim did not display any traumatic predispositions or suffer any visible physical injuries thus rewarding the offender for having chosen his victim well.

[15] The referral also by the Appellant to the fact that Complainant did not suffer any physical injuries is misconceived. In the case of rape that fact does not reduce the gravity of the offence. **S 51 (3) (aA) (ii)** of the Criminal Law Amendment Act 105 of 1997 provides that an apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence when imposing a sentence in respect of the offence of rape.

[16] I am satisfied that there was no material misdirection by the court a quo that can justify interference with its sentencing of the Appellant, under the circumstances I make the following order:

[16.1] The appeal against sentence is dismissed. The court a quo order on conviction and sentence stands.



N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

I concur



C VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH

COURT

GAUTENG DIVISION

On behalf of Appellant: Adv R S MATLAPENG
Instructed by: Pretoria Justice Centre
Legal Aid: South Africa

On behalf of Respondent: M MOLATUDI
Instructed by: National Director of Public
Prosecutions