

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIEK VAN SUID-AFRIKA

CASE NUMBER: A538/14

DATE: 26 FEBRUARY 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

JUSTICE TANKISO MOKOENA

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The appellant was convicted on two charges in the court *a quo*, to wit a count of housebreaking with the intent to rob and robbery with aggravating circumstance and a count of rape. Upon conviction the appellant was sentenced to 15 years imprisonment in respect of the robbery charge and to a term of life imprisonment in respect of the rape charge.

[2] The appeal is against both conviction and sentence.

BRIEF BACKGROUND

[3] The circumstances surrounding the conviction of the appellant, may be conveniently summarised as follows:

- i) on the evening of 16 May 2010, Mr T[...] M[...], the complainant in count 1 and his daughter, A[...] M[...] (A[...]), the complainant in count 2, was asleep in Mr M[...]’s house;
- ii) around 2:00, Mr M[...] was awakened by the sounds of A[...] crying. Upon enquiring what the problem was, Mr M[...]’s bedroom door was kicked down and he was instructed not to move;
- iii) although there were no lights on, Mr M[...] could see the intruders in the light created by their cell phones. Mr M[...] not only had a look at the faces of the two intruders, but also saw that one of the intruders was armed;
- iv) Mr M[...] was hit with the firearm over his head and thereafter instructed to open his tuck shop. The intruders robbed him from several items in the tuck shop;
- v) before and during Mr M[...]’s ordeal, Amanda was raped by the intruders;
- vi) after the intruders left, Mr M[...] called the police and A[...] was taken to a doctor for a medical examination;
- vii) it is not in dispute that swabs were taken from A[...] and that the DNA found in the swabs accords with the DNA of the appellant and his co-accused in the court a *quo*;
- viii) it is, furthermore, not in dispute that the appellant was identified by Mr M[...] as one of the intruders during an identification parade.

AD CONVICTION

GROUND OF APPEAL

[4] On behalf of the appellant two grounds of appeal were raised:

- i) firstly, the identification of the appellant; and
- ii) secondly, the chain of evidence relating to the swabs taken from A[...].

EVIDENCE

[5] Mr Kgagara, counsel for the appellant correctly conceded that if the chain of evidence referred to above is established, the question of the appellant's identification falls away.

[6] Dr Lopes examined A[...] on 16 May 2010 at 6:00. During her examination she obtained the swabs and sealed the swaps in an evidence collection kit with number 09D1AA9564XX. The fact that the swaps were taken and sealed a set out *supra* is not in dispute.

[7] Dr Lopes testified that she handed the evidence collection kit to a nurse.

[8] Captain Mphephu, who is attached to the Biology Unit of the Forensic Science Laboratory, deposed to an affidavit in terms of section 212 of the Criminal Procedure Act, 51 of 1977, which affidavit was accepted into evidence.

[9] In his affidavit, he states that he received swabs with seal number 09D1AA9564XX from the Administration component of the Biology Unit of the Forensic Science Laboratory. He duly extracted DNA from the swabs, which DNA, as stated aforesaid, correlates with that of the appellant.

[10] In view of this evidence, it is clear that the swabs taken by Dr Lopes were indeed the swabs examined and referred to by captain Mphephu in his section 212 affidavit.

CONCLUSION

[11] I am satisfied that the court *a quo* correctly convicted the appellant on both counts and the appellant's appeal against conviction falls to be set aside.

AD SENTENCE

[12] The sentence imposed by the court *a quo* of 15 years on the robbery charge and life imprisonment on the charge of rape, is the minimum sentence prescribed by the General Law Amendment Act, 105 of 1997 (the Act), for these offences.

[13] In terms of section 5(3) of the Act, a court may deviate from the minimum sentence if substantial and compelling circumstances justify such a deviation.

[14] The appellant alleges that the imposition of the minimum sentence is disproportionate to the particular facts of this matter.

[15] The personal circumstances of the appellant appear from the record and need not be repeated herein. As appear *supra*, the circumstances under which these crimes were perpetrated are especially hideous.

[16] The appellant and his co-accuse entered the innermost sanctum of the victims. Once home is suppose to be a place of safety and security. To furthermore, violate a woman's privacy, her dignity, her bodily integrity, is without doubt, one of the most serious crimes to commit.

[17] The court a *quo* carefully considered all aspects pertaining to sentencing and properly and reasonably exercised his discretion in imposing the sentences.

[18] In the premises, I am of the view that the sentence imposed by the court a *quo* is proportionate to the crimes committed and no grounds exit to interfere therewith.

ORDER

In the premises, I propose the following order:

The appeal against conviction and sentence is dismissed.

N JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree,

M G PHATUDI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

It is so ordered.

APPEARANCE ON BEHALF OF THE APPELLANT:

ADVOCATE MR M. B. KGAGARA

APPEARANCE ON BEHALF OF THE STATE:

ADVOCATE A.J FOURIE