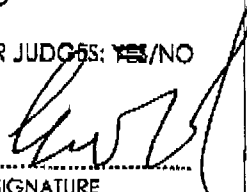


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

14 / 7 / 15

CASE NUMBER: A729 / 14

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: <u>14/7/15</u>
	DATE
	SIGNATURE 

In the matter between:

MFANAFUTHI AMOS MTHOMBENI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MOLOTO AJ

Introduction

1. The appellant, Mfanafuthi Amos Mthombeni, was on the 16th May 2014 convicted of the crime of rape by the Benoni Regional Court and sentenced to life imprisonment.
2. An accused sentenced to life imprisonment by a regional court, has an automatic right of appeal (s309(1)(a) as read with s309(B)(1)(a) of the Criminal Procedure Act 51 of 1977. In *casu*, the appeal is against sentence only.

The Issues

3. Mr Moeng on behalf of the appellant argued that the learned regional court magistrate misdirected himself in that he should have found that substantial and compelling circumstances existed as envisaged by Section 51 (3) (a) of the Criminal Law Amendment Act 38 of 2007, warranting the court *a quo* to impose a sentence less than the prescribed minimum of life imprisonment. It was also submitted that the sentence invoked a sense of shock and was startlingly inappropriate.
4. Mr Moeng decried the fact that the personal circumstances of the appellant which were placed on record by his legal representative was scanned as it was from an affidavit used during bail application thus inadequate and the regional magistrate should have called for more information before meting the out sentence of life imprisonment. Sited in support of this proposal were the cases of :-
 - (i) S v Samuels 2011 (i) SACR 9 (SCA)
 - (ii) S v Van De Venter 2011 (1) SACR (SCA)
 - (iii) S v de Kock 1997(2) SACR 171 T
 - (iv) S v Dlamini 200(2) SACR 266 T
 - (v) S v Khumalo 1989(3) CPD
 - (vi) S v Skenjana 1985(3) SA 51 A
 - (vii) S v Mafu 1992(2) SACR 49 A
 - (viii) S v Nkambule 1993(1) SACR 136 A
 - (ix) S v Mhlakaza 1997(1) SACR 515 SCA
 - (x) S v Pieters 1987(3) 717 A
 - (xi) S v Mafunya 1972(4)565 O
 - (xii) S v Skutte 1959(1) SACR 344
5. The thrust of the appellants' argument was that when accused's personal circumstances vis his age i.e 24 years, that he was a first offender, complainant didn't suffer physical injuries were fused to the facts of the case, the court *a quo* should have found that there were substantial and compelling circumstances, warranting imposition of a lesser sentence, of at least 20 years' imprisonment. Vide the case of S v Mthetwa and others 2015 (1) SACR 302 GP where it was stated that, it was one thing to recite the personal circumstances of an accused and another to fuse those into the consideration of sentence. Those were all legitimate considerations but our sentencing ethos enjoined a sentencing court to carefully balance those against the personal circumstances of the appellant lest an imbalanced sentence result.
6. The state counsel, Advocate GJC Maritz highlighted the facts of the case, showing how the appellant abducted the victim from the streets, when walking with a friend, took her to his room, where he forced himself on her, after he

slapped her and threaten her with a firearm. She was raped three times virginally and once per anus. Intervention by the victims' friends and appellant's friend was to no avail. The state counsel opined that there were no substantial and compelling circumstances to make the court a quo to deviate from the prescribed minimum sentence of life imprisonment. Cases cited in support of the respondents' argument were the following

- (i) S v Rabie 1975(4) SA 855 A
- (ii) S v Chapman 1997(2) SACR 3 SCA
- (iii) S v SMM 2013(2) SACR 292 SCA
- (iv) S v Matyityi 2011(1) SACR 40 SCA

CASE LAW

7. It is trite that, in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court, and the court of appeal should be careful not to erode that discretion.
 8. A sentence imposed by a lower court should only be altered if:-
 - (i) An irregularity took place during trial or sentencing stage.
 - (ii) The trial court misdirected itself in respect of the imposition of the sentence.
 - (iii) The sentence imposed by the trial court would be described as disturbingly or shockingly inappropriate.
- Vide (i) S v Mogaramedi 2015 (1) SACR 427 GP
- (ii) S v Chinridze 2015(1) SACR 364 GP
9. In the case of S v GK 2013(2) SACR 505 WCC it was held that there is nothing in the Act which fettered an appellate court's power to reconsider the matter of substantial and compelling circumstances. The values of the constitution were better served by an interpretation which did not fetter the appellate court when it came to the question of the presence or absence of substantial and compelling circumstances. To allow an appellate court to make its own value judgment on appeal provided accused persons with greater safeguards against the imposition of disproportionate punishment.
 10. Though Mr Moeng decried the fact that appellants personal circumstances placed on record were not enough and the trial court should have called for more, the record reflects that much was done. This appears on page 117-119 of the record. This court is of view that information placed before the court a quo was enough

for it to decide on an appropriate sentence and there is no need to call for more information as suggested by Mr Moeng.

11. In the *S v Madiba* 2015 (1) SACR 485 SCA the supreme court of appeal held that all of the circumstances in mitigation paled into insignificance when the brutality of the rape perpetrated by the appellant was considered.
12. This case before us can be compared to the case of *S v Mathuse* 2014(2)SACR 38 GJ as with many others. In Mathuse's case the appellant a 33 year old first offender, was convicted in a regional court of rape and was sentenced to life sentence. He appealed against his sentence. The evidence indicated that the appellant knew her complainant and was at some stage the boyfriend of the complainant's sister. He attacked the complainant in her own home and stabbed her several times with a screwdriver in order to subdue her. When she managed to take away the weapon, he hit her with a bottle. On appeal, the appeal court held that that the trial court had not sufficiently accentuated that the appellant was a 33 year old first offender despite the fact that he had only achieved a grade 5 level of education, managed to make a living for himself and his family of three dependants as a street vendor even though there was a high level of unemployment in the country as a whole. In the light of his personal circumstances taken cumulatively, the trial court ought to have found, the existence of substantial and compelling circumstances. Held further that quite apart from the existence of substantial and compelling circumstances a sentence of life imprisonment was disproportionate to the offence committed when viewed with comparable cases

vide other cases

- (i) *S v Maswanganyi* 2014(1)SACR 622 GP
- (ii) *S v SM* 2014(1) SACR 53 GNP
- (iii) *S v Mabaso* 2014(1) SACR 299 KZP
- (iv) *S v EN* 2014(1) SACR 198 SCA

13. However Van der Heever JA In *S v Sindeni* 1995(2) SACR 704 A at 708 a observed:-

"Decided cases dealing with sentence may be a value as providing a guideline for the trial court's exercise of its discretion (See SvS 1977(3)SA830 (A)) and they sometimes provide useful guidance where they show a succession of punishment imposed for a particular type of crime(see Sv Karg 1961(1)SA 231(A) 236G). But it is an idle exercise to try to match the colours of the case at hand an the colours of other cases with the object of arriving at an appropriate sentence" each case should be dealt with on its facts connected with the crime and the criminal,,,"

Vide also S v Van Rensburg 2015(1)SACR 114 NCK

14. In S v Mthethwa and others 2015(1)SACR 302 GP the appeal court decried the fact that the court a quo failed to take sufficiently into consideration the personal circumstances of the appellant, as well as the circumstances of the commission of the offences. It was one thing to recite the personal circumstances of an accused and another to fuse those into the consideration of sentence. The court had paid lip service to this component of sentencing and nowhere had the magistrate considered the poor socio-economic background of the appellant in his judgement on sentence. Approximately 80% of the judgement was devoted to the seriousness of the offences and their impact on the complainants. Those were all legitimate considerations but our sentencing ethos enjoined a sentencing court to carefully balance those against the personal circumstances of the appellants, lest an in balance sentence results.

RATIONES DECIDENDI

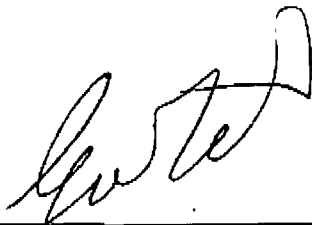
15. Having looked at the records I do not see how the court a quo fused appellants' personal circumstances into the consideration of sentence. Much emphasis was placed on the seriousness of this rape offence, which of course is serious given the fact that the victim was abducted from the street, kept overnight and raped four times. It is given that this 19 year old victim spurned the appellant's love proposition and advances before this. He was a first offender, and a youth but this was not considered or given any weight when considering the circumstances of the case and appropriate sentence to be meted out. Failure to carefully consider all this factors made the sentence of life imprisonment disturbingly inappropriate.

ORDER

I propose the following order:

1. The appeal against sentence of life imprisonment succeeds.
2. The sentence is set aside and replaced by the following:

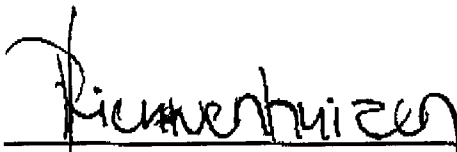
"The accused is sentenced to 20 years' imprisonment"
3. The sentence is antedated to 16 May 2015.



MOLOTO AJ

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

I agree and it is so ordered.



N JANSE VAN NIEUWENHUIZEN

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

ATTORNEY'S DETAILS

Appearance on behalf of the State: S MOENG

APPELLANT'S ATTORNEY

PRETORIA JUSTICE CENTRE

2ND FLOOR FNB BUILDING

CHURCH SQUARE

PRETORIA

TEL: 012 401 9200

082 299 1644

Appearance on behalf of the *Appellant* ~~State~~: S MOENG

ATTORNEYS FOR THE RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

PRIVATE BAG X300

PRETORIA

0001

TELEPHONE NUMBER: 012 351 6832/084 257 9436

Appearance on behalf of the State: Advocate: G. J. C. Maritz