



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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
<u>DATE</u>	<u>SIGNATURE</u>

CASE NO: A123/2015

DATE: 19/8/2015

IN THE MATTER BETWEEN

LUCAS SABELO NKOSI

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

MAKUME, J

[1] The appellant was convicted on 24 January 2014 in the regional court sitting in Brakpan on the following charges:

- 1.1 one count of rape;
- 1.2 one count of possession of a dangerous weapon.

[2] The appellant was sentenced to fifteen years imprisonment for rape and six months imprisonment for possession of a dangerous weapon. He was granted leave to appeal against sentence on petition by this court. The trial court did not order that the sentences run concurrently.

[3] The grounds of appeal against sentence as I understand them from a reading of the appellant's heads of argument can be summarised as follows:

3.1 It is argued that the appellant was not warned that in the event of being convicted on the count of rape the minimum sentence will be applicable.

3.2 That the trial court erred in imposing a sentence higher than the prescribed minimum sentence of ten years by sentencing the appellant to fifteen years without giving reasons.

3.3 That the trial court erred in over-emphasising the seriousness of the offence and under-emphasised the personal circumstances of the appellant.

3.4 That the lengthy sentence of fifteen years is shockingly harsh and induces a sense of shock.

3.5 That the trial court failed to investigate the presence or absence of substantial and compelling circumstances.

3.6 That the trial court failed to take into account the period of two years and four months that the appellant spent in custody awaiting trial.

3.7 That the trial court erred in not making an order that the sentence of six months in count 2 run concurrently with the sentence in count 1.

The facts

[4] The appellant stalked the complainant over a period of time until on 22 October 2011 when he broke into her room at about midnight and raped her.

[5] The appellant told the complainant before he raped her that today is her day and that he is going to kill her because it is long that he has been telling her that he loves her. The appellant pointed a knife at her, undressed her and raped her. When he had finished he showed the complainant the window in her room through which he gained entry. The appellant left at about 04:15 after threatening the complainant with death should she report the incident.

[6] The following morning at about 05:30 the complainant left her home with the intention to go and report the incident at Brakpan police station. She noticed the appellant at the stop-sign near her place. She became scared

and instead walked to the station where she boarded a train and went to her work. She reported the incident to a security man at Dunswart station.

[7] The appellant kept on phoning her. She told the police about this and a trap was set up and on 25 October 2011, the appellant was arrested whilst at the gate of the premises where the complainant lives.

[8] In his defence the appellant told the court that the complainant was his girlfriend and that they had consensual sex. He denied having raped the complainant.

The sentence

[9] I do not deem it necessary in this judgment to deal with each and every ground of appeal raised suffice it to say that at the nub of the grounds of appeal are the following:

- (a) was the trial court justified in imposing a sentence of fifteen years instead of ten years which is the prescribed minimum sentence for a first offender on rape;
- (b) should the trial court have not taken into consideration the period spent by the appellant in custody whilst awaiting trial;
- (c) should the trial court not have ordered that the sentence on count 2 run concurrently with the sentence on count 1.

[10] It is trite law that punishment is pre-eminently a matter for the discretion of the trial court. In this matter the learned court *a quo* found correctly so that the appellant had shown no remorse and concluded that the fact that he had spent time in custody awaiting trial does not constitute substantial and compelling circumstances.

[11] This aspect was dealt with by the Supreme Court of Appeal in the matter of *S v Radebe* 2013(2) SACR 165 at page 171 where Lewis JA says the following at paragraph [18]:

"It is so that the appellants spent two years and ten months in detention before they were convicted. That must of course be taken into account. But in my view this factor does not outweigh the aggravating circumstance attendant on the crime committed. As pointed out by counsel for the state detention for some of that period was the result of the appellants insisting on private legal representation although they did not have the ability to pay for it and by the changing of their versions during the course of the trial such that a trial-within-a-trial had to be held. As the regional magistrate said they had only themselves to blame for the lengthy period under which the trial was conducted."

[12] The same can be said about this matter not only does the appellant have previous convictions involving violence but it is also correct that there are aggravating circumstances attendant. The complainant was stalked for days by a man whose advances she had rejected. She was then surprised in the middle of the night in the quite of her home where she thought she was safe. She was threatened with a knife and the appellant warned her that if she should report the incident he will kill her. He continued harassing and telephoning her after the ordeal. When she was giving evidence she broke down in the witness-box which indicates that she was still traumatised a year after the incident. The learned Lewis JA in the *Radebe* matter found that the period spent in detention awaiting trial was not on its own substantial and compelling circumstances.

[13] The next aspect is whether the trial court was justified in sentencing the appellant to fifteen years instead of the prescribed minimum of ten years. Our courts have in the past reminded that there is no prohibition in passing of sentence for a period more than the prescribed minimum because as the Act says it is a minimum sentence and it remains the starting point.

[14] Pillay AJ in *S v Nkunkume* 2014(2) SACR 166 (SCA) at page 177 paragraph [17] describes rape in the following terms:

"[17] *Rape must rank as the worst invasive and dehumanising violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution. There does not seem to be any significant decline in the incidence of rape since the publication of the statistics above. The same can be said of robbery. No matter how they are viewed society has called on more than one occasion for the courts to deal with offenders of such crimes sternly and severely.*"

[15] In the present matter the appellant breached the sanctity of the complainant's home. It must have been a terrifying ordeal for her to be woken up and be surprised by a person brushing her thighs in the middle of the night. She broke down whilst testifying.

[16] The only other aspect remaining is whether the trial court should have made the sentence of six months run concurrently with the fifteen years sentence. I hold the view that he should have done so.

[17] In the result I make the following order:

(a) The appeal is dismissed.

- (b) The sentence of six months on count 2 shall run concurrently with the sentence of fifteen years on count 1.

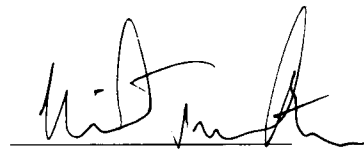
Dated on this day of ..7th August 2015.



MAKUME M. A.

(JUDGE OF THE HIGH COURT)

I agree



TUCHTEN N. B.

(JUDGE OF THE HIGH COURT)

HEARD ON:
FOR THE APPELLANT:
INSTRUCTED BY:

30 JULY 2015
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