

14/2/13

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT
PRETORIA

CASE NO: A318/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
14 FEBRUARY 2013	
DATE	SIGNATURE

In the matter between:

THEMBA SIMON MAJOLA

Appellant

and

THE STATE

Respondent

J U D G M E N T

TEFFO, J:

[1] The appellant was charged and convicted of one count of kidnapping, one count of assault and one count of rape by the Regional Magistrate, N K Mkwentla, sitting in the Regional Court, Sebokeng on 28 September 2009.

[2] On the same date, 28 September 2009, the appellant was sentenced to 4 years imprisonment in respect of the kidnapping charge. He was cautioned and discharged in respect of the assault and sentenced to 20 years imprisonment in respect of the rape count. The appellant was also declared unfit to possess a firearm.

[3] The court *a quo* did not order the sentences to run concurrently.

[4] Leave to appeal against conviction and sentence was refused by the trial court but granted on petition by this Court. The appellant now approaches this Court with an appeal against the conviction and sentence.

[5] According to the evidence the charges against the appellant arise from an incident which occurred on 8 March 2009 where it is alleged that the appellant kidnapped, assaulted and raped Kedibone Anna Mahlatsi (the complainant) more than once at his house after he forced her to his house by pulling, grabbing, slapping and kicking her from the street where he met her and held her at his house against her will until the next morning.

[6] It is also alleged that as the complainant was being pulled, grabbed and assaulted by the appellant, she managed to get loose from him and ran to the house of Salamina Motaung ("*Motaung*"), the appellant's neighbour, to seek help. Despite this the appellant followed her and as a result Motaung locked the security gate.

[7] Motaung testified that the complainant was crying and she told her that she was seeing the appellant for the first time when she asked her if they had a love relationship. She corroborated the complainant's evidence in all material respects in relation to how she came to her house on the day in question, all what transpired at her house while the complainant was there and how she had to beg the appellant to let the complainant go home until the appellant left her yard and waited for the complainant outside. Her further evidence was that as she was taking the complainant out of her yard, she saw the appellant grabbing and pulling the complainant from her yard to his while he was also assaulting her until he opened his house and pulled her inside.

[8] Motaung also testified about the appellant's attitude on the day in question, the way he was angry, making noise at her house while he was pulling the security gate at her door. Further that she could see that the complainant was in trouble and that she did not want to go with the appellant. She further explained that she could not do anything to help her as she did not have a cellphone and did not want the appellant to beat her at her house. Her further evidence was that nobody could assist the complainant at her street because most of the houses are owned and occupied by elderly people.

[9] Dr Baluti Pandamali ("*Pandamali*") also gave evidence about what he observed when he examined the complainant the next day after the incident. According to him she had bruises, her right forearm and left cheek were swollen, and she also had an abrasion on her mouth. He also examined her private parts and found that her vagina was like a clock. There was redness

around the vagina and a tear at 7 o'clock around the hymen. He concluded that there had been forceful penetration of the complainant's vagina. Accordingly the complainant's version was compatible with his findings. His view was that in normal sexual intercourse one would not find redness around the vaginal area as that is caused by the friction between the penis and the vagina.

[10] The appellant's version was that the complainant came to his homestead and they had consensual sexual intercourse. He admitted that on the day in question he met the complainant at Extension 3 and from there the two proceeded to Extension 7, in Everton. On the way they met three gentlemen and the complainant went to their house which is next to his. When he went to fetch her, she refused and he left her there and went to his house. Later on the complainant arrived at his house and told him that one of those gentlemen was forcing love from her and she told him that she does not love him anymore. The complainant then agreed to spend the night with him at his house. They had supper and then went to the bedroom where they had consensual sexual intercourse three times that day and once in the morning. He also led evidence to the effect that he had a love relationship with the complainant from the previous year of the incident but she never spent a night at his house. Further that he did not know that the complainant was under the age of 16 years.

[11] The appellant denied that the complainant was running away from him when she ended up at Motaung's house and maintained that she was running away from the gentlemen they met on their way. Later on he changed and said the complainant was never chased. He also denied ever assaulting and kidnapping her.

[12] When the matter was argued in court counsel for the appellant conceded that the appellant was correctly convicted if one takes into account the evidence of Motaung who did not know her prior to the incident and only saw her on the day of the incident when she ran to her house for help. He made a submission that Motaung's evidence corroborated the complainant's evidence in all material respects. Motaung who is said to be the appellant's neighbour did not have any reason to implicate him in this matter. The court *a quo* correctly found that she was a good and honest witness. The appellant's version was full of contradictions as alluded to in the trial court's judgment. The court *a quo* correctly rejected his version as not being reasonably possibly true and it correctly found that the State proved its case beyond a reasonable doubt against the appellant. I therefore agree with the appellant's counsel that indeed the court *a quo* correctly convicted the appellant on all three counts he was facing and that the court *a quo* did not misdirect itself in this regard.

[13] I now turn to the appeal against sentence. It is trite law that in every appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal –

- “(a) *should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court, and*
- (b) *should be careful not to erode such discretion : hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised.” (S v Rabie 1975 (4) SA 855 (A) at 857D-F.)*

[14] Counsel for the appellant further submitted that the charge-sheet in respect of the rape count, refers to s 51(2) of Act 105 of 1997 but when the charge was read to the appellant for him to plead, the State mentioned that the charge was read with the provisions of s 51(1) of Act 105 of 1997.

[15] He argued that he cannot as such submit that the court *a quo* misdirected itself with regard to the sentence on the rape charge as the court correctly found that there were substantial and compelling circumstances that justified it to impose a lesser sentence than life imprisonment.

[16] He further argued that the fact that there is no misdirection on the part of the trial court does not mean that a higher court would not interfere and referred to the case of *S v Malgas* 2001 (1) SACR 469. In the same breadth he submitted that the court *a quo* should have ordered that the sentence on the kidnapping charge should run concurrently with the sentence on the rape charge.

[17] On the other hand counsel for the State submitted that although there are differences in the two sections referred by the appellant's counsel, viz, s 51(2) and s 51(1) of Act 105 of 1997, the appellant was not prejudiced when

he pleaded as the State brought that aspect to the court's attention. Further that there was no misdirection on the court *a quo* and the sentence imposed is proper.

[18] It is my view that the evidence led tallied with a rape charge that is read with the provisions of s 51(1) of Act 105 of 1977 and this was the charge to which the appellant pleaded. The appellant did not plead to a charge of rape that is read with the provisions of s 51(2) of Act 105 of 1997. The court *a quo* correctly found that in terms of the provisions of s 51(1) of Act 105 of 1997 which prescribes a minimum sentence of life imprisonment there were substantial and compelling circumstances that justified it to impose a lesser sentence than life imprisonment and imposed a sentence of 20 years imprisonment.

[19] The State concedes that the trial court should have ordered that the sentence on the kidnapping charge should run concurrently with the sentence on the rape charge.

[20] Section 280 of Act 51 of 1977 as amended provides as follows:

- “(1) *When a person is at any trial convicted of two or more offences or when a person under a sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences, or, as the case may be, to the punishment for such other offence, as the court is competent to impose.*
- “(2) *Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”*

[21] In *S v Mate* 2000 (1) SACR 552 (T) the court decided that where there is a close link between offences the concurrence of sentences is appropriate. When the elements of one offence are closely bound up with the elements of the other offence the concurrence of the sentences should more particularly be considered.

[22] In the present matter the evidence reveals that the appellant kidnapped the complainant in order to go and rape her. The kidnapping and the rape of the complainant are closely linked and they flow from the same incident. I am persuaded that the trial court should have ordered that the sentence in the kidnapping charge should run concurrently with the sentence in the rape charge. This means that the appellant will effectively serve a sentence of 20 years imprisonment. In my view the court *a quo* by not ordering the two sentences to run concurrently as they flow from the same incident has not judicially and properly exercised its discretion. I am thus of the view that this Court will be justified in intervening on the sentence that has been imposed by the trial court.

[23] In the premises I would make the following order:

1. The convictions on all counts as imposed by the court *a quo* are confirmed.
2. The sentences of 4 years on the kidnapping charge and 20 years on the rape charge are confirmed.

3. The sentence of 4 years on the kidnapping charge is to run concurrently with the sentence of 20 years on the rape charge.
4. The sentence in respect of the kidnapping and the rape charge is antedated to 28 September 2009.


M TEFFO
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

I agree:


W HUGHES
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

HEARD ON	28 JANUARY 2013
DELIVERED ON	14 FEBRUARY 2013
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