

Reportable: Yes / No Circulate to Judges: Yes / No Circulate to Magistrates: Yes / No
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IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no: CA&R 124/07
Date heard: 2008-09-08
Date delivered: 2008-09-12

In the appeal of:

AYANDA MABIKA

APPELLANT

versus

THE STATE

RESPONDENT

Coram: MAJIEDT J *et* MOLOI AJ

JUDGMENT ON APPEAL

MAJIEDT J:

1. The Appellant was convicted in the local Regional Court on the following charges:
 - a) Kidnapping
 - b) Attempted rape
 - c) Escaping from lawful custody.

He was sentenced to four years imprisonment on the charge of

kidnapping, six years imprisonment on the charge of attempted rape and twelve months imprisonment on the charge of escaping from lawful custody. It was ordered that the latter sentence run concurrently with the sentences in respect of the firstmentioned two counts, thus an effective ten years imprisonment on all the counts.

2. The Appellant was granted leave to appeal against his sentence only by the *Court a quo*. When the matter came before Lacock J and Mokgohloa AJ, they postponed the appeal and granted the Appellant an opportunity to lodge a petition for leave to appeal against his conviction on kidnapping, the learned Judges having taken the *prima facie* view that there may have been a splitting of charges concerning the attempted rape and kidnapping convictions. The Appellant has now filed a substantive application condoning his late application for leave to appeal and seeking leave to appeal against the conviction on the kidnapping count. Counsel for the State, Mr. Bagananeng has, quite correctly in my view, conceded in his supplementary heads that the conviction on kidnapping amounts to a splitting of charges (or more correctly a duplication of convictions).
3. The common cause and proved facts were briefly as follows:
 - a) The complainant, who was 17 at the time of the incident, testified that she had accompanied her neighbour during the early evening to a taxi rank and, on her return, the Appellant grabbed her and dragged her to an alleyway behind certain shops where he took out a knife and called his friend. This

friend of the Appellant slapped the complainant and searched her for money and thereafter strangled her. The Appellant then took off the complainant's pants and panties.

- b) She was menstruating at the time, but this did not deter the Appellant. The Appellant was in the process of taking off his own clothes when people arrived on the scene and an alarm went off, causing the Appellant and his friend to flee the scene. She knew the Appellant from primary school, but not his friend.
- c) She sustained certain injuries, namely a swelling of the lip where she had been hit on the mouth by the Appellant.
- d) This version of the complainant was confirmed by the State witness, Mmbatho Mackenzie, namely that the Appellant and his friend had dragged the complainant behind the shop where the Appellant had assaulted the complainant. Ms Mackenzie and her friend went to a nearby shop and informed the shop owner, one Taki, about the incident. Taki went to investigate, returned to the shop and activated the shop's alarm. Taki, whose full name is Joseph Motsage, also confirmed his role in the events as described by Mmbatho Mackenzie,. He was unable to identify the Appellant or his friend, since he did not know them previously.
- e) Evidence was also led of the investigating officer who testified that charges against the Appellant's co-accused

were withdrawn, because neither the complainant nor the witnesses were able to point him out at an identification parade. Further evidence was led of a court orderly at the local Magistrate's Court, Mr. Dyers, who testified about the escaping from lawful custody charge. He testified that the Appellant had escaped from the court cells. The doctor who had examined the complainant also testified to the effect that he had observed swelling of her upper lip and abrasions on her neck.

- f) The Appellant testified and denied that he had done anything to the complainant on the night in question. He testified that he saw her in passing with a friend of his (his erstwhile co-accused) and it appeared as if the two of them were having an affair.
- 4. The Regional Magistrate rejected the Appellant's version as false beyond reasonable doubt and, in reliance on the State's evidence, convicted the Appellant as aforementioned.
 - 5. In this judgment it is necessary to consider only the question of the possible duplication of convictions on the kidnapping and attempted rape charges as well as the sentence imposed on the Appellant.
 - 6. In our law a general rule of practice has developed to avoid the splitting of charges or, put differently, the duplication of convictions. Our courts have developed guidelines in this regard. See generally *inter alia*: **R v Kuzwayo 1960(1) SA 340 (A)** at 344

A-B;

S v Grobler en 'n ander 1966(1) SA 508 (A) at 523 F;

S v Waites 1991(2) SACR 388 (NC) at 390 g – 391 i;

S v Murbane 1992(1) SACR 298 (NC) at 299 f-j.

7. In **S v Benjamin en 'n ander 1980(1) SA 950 (A)** at 956 E-H, Joubert JA stated the application of the guidelines to determine whether there had been improper splitting of charges as follows:

“Hierdie Hof het telkemale daarop gewys dat ons regspraak nog nie daarin geslaag het om 'n algemene vaste reël of beginsel of toets te formuleer waarmee daar in alle gevalle met sekerheid bepaal kan word of 'n mens in 'n besondere geval met 'n onbehoorlike splitsing van aanklagte te doen het of nie. Om te beslis of daar in 'n bepaalde geval 'n onbehoorlike splitsing van aanklagte is, maak ons Howe veral van twee praktiese hulpmiddels gebruik, nl:

(1) waar meerdere handelingte plaasgevind het, of hulle met 'n enkele opset verrig is as 'n voortgesette gebeurtenis,

(2) waar die getuienis om die een aanklag te bewys ook meteen die ander aanklag bewys.

Hierdie twee praktiese hulpmiddels kan ook afsonderlik of gesamentlik toegepas word. Dog selfs hierdie twee praktiese hulpmiddels is nie noodwendig deurslaggewend nie, soos aangetoon deur hierdie Hof in R v Kuzwayo 1960 (1) SA 340 (A) te 344A en S v Grobler en 'n Ander 1966 (1) SA 507 (A) te 511H. Wat veral in gedagte gehou moet word, is dat daar steeds gelet moet word op die besondere omstandighede van die betrokke geval om vas te stel of daar 'n onbehoorlike splitsing van aanklagte is wat 'n duplikasie van skuldigbevindings meebring sodat die beskuldigde twee maal vir dieselfde strafbare feit of misdaadelement gestraf word.

8. In my view the same evidence test which is used as a guideline is

applicable in the present matter. The rule applicable here is that if the evidence required to prove one criminal act necessarily involves the proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal conviction. To avoid unfairness, conviction on two separate offences in those circumstances is not permissible. In the present matter, the evidence relating to the fact that the complainant had been dragged behind the shops into the dark alleyway, in my view formed one continuous act in the course of the perpetrating of the attempted rape by the Appellant and his confederate. In the circumstances, in my view, it amounts to a splitting of charges or a duplication of convictions insofar as the Appellant was convicted of both kidnapping and attempted rape. The position is the same in respect of the offence of assault with the intent to inflict grievous bodily harm, which was added as an alternative to the kidnapping charge. The assault on the complainant was perpetrated in the course of the attempted rape, so that it would amount to a duplication of convictions to convict the Appellant on both attempted rape and the alternative charge of assault with the intent to inflict grievous bodily harm.

9. This brings me to the sentence. There can be no quarrel with the sentence of twelve months imprisonment imposed on the charge of escaping from lawful custody. Moreover, the fact that the Regional Magistrate ordered that term of imprisonment to run concurrently with the terms imposed for kidnapping (which of course now falls away) and attempted rape, greatly ameliorates the cumulative effect of the sentence. Having said that, however, I am of the view that interference in the sentence imposed for

attempted rape is warranted. It will be recalled that the Appellant was sentenced to six years imprisonment on this count. It is trite that an Appellate Court does not have an unfettered discretion to interfere with the sentence of a Trial Court. It can only do so where the sentence is shockingly inappropriate or where a substantial misdirection has occurred in the consideration and imposition of the sentence.

See *inter alia*:

S v Shaik 2008(1) SACR 1 (CC) at par. [72].

I am of the view that the sentence on the attempted rape charge is shockingly inappropriate, which warrants interference on appeal and a fresh consideration of an appropriate sentence.

10. The evidence of two witnesses was led to assist the Regional Magistrate in consideration of an appropriate sentence. Ms Conradie, a social worker, drew up a written pre-sentence report and came to the conclusion that direct imprisonment would be the only appropriate sentence. Mr. Charles Basson, of the Department of Correctional Services, also prepared a written report with regard to the Appellant's suitability for correctional supervision. He recommended direct imprisonment and found that the Appellant was not suitable to be sentenced to correctional supervision, primarily because the Appellant did not comply with the conditions imposed in a previous correctional supervision sentence.
11. In the report of Ms Conradie, a useful table depicting the mitigating and aggravating circumstances had been drawn up by her. I am

in agreement with her that the following mitigating circumstances ought to be taken into account:

- a) The fact that the Appellant had been in custody for 8 months at the time of sentencing;
- b) The Appellant had a young child and a sickly grandmother;
- c) As an informer for the police he had made a contribution towards crime prevention;
- d) He had no previous conviction in respect of violent offences; and
- e) He had handed himself over to the authorities a day after his escaping from lawful custody.

I would add to the aforementioned the fact that the Appellant, at age 22, was relatively youthful.

12. Again I concur with Ms Conradie that the following aggravating factors also require consideration:

- a) The fact the complainant was still a minor (17 at the time of the incident);
- b) Violence against women and children is *per se* aggravating;
- c) The fact that the Appellant failed to accept responsibility for his misdeed and exhibited no remorse at all; and
- d) That, as an informer for the police, he was familiar with the extent and consequences of crime, particularly violent crime.

I would add to the aforementioned aggravating circumstances, the fact that the Appellant inflicted injuries on the complainant in the course of the attempted rape, as is confirmed by the medical J88 certificate and the testimony of Dr. Cupido at the trial. Rape is particularly prevalent in this area, which is a further factor which requires consideration.

13. In the assessment of the aforementioned mitigating and aggravating circumstances, I am of the view that a sentence of six years imprisonment for attempted rape induces a sense of shock and that it overemphasizes the gravity of the offence and largely underemphasizes the mitigating circumstances of the Appellant. While there can be no doubt that a term of direct imprisonment is called for (it is of some significance that the complainant herself conveyed to Ms Conradie that she would prefer that the Appellant be sentenced to long term imprisonment), a term of six years is wholly inappropriate, given the circumstances of this case. In my view a shorter term of direct imprisonment would be more appropriate and would afford the Appellant who, to a significant extent was a useful member of society, assisting the police with criminal investigations, an opportunity to rehabilitate in prison. This can be achieved by suspending a portion of the said term of imprisonment.
14. In the premises I would interfere with the sentence imposed for attempted rape and replace it with a sentence of six years imprisonment, suspending two years thereof on suitable conditions.

15. I issue the following order:

15.1 The Appellant's late filing of his application for leave to appeal against his conviction of kidnapping is condoned.

15.2 The Appellant is granted leave to appeal to this Court against his conviction on kidnapping.

15.3 The Appellant's appeal against his conviction on kidnapping succeeds. His conviction on kidnapping and sentence of four years imprisonment are set aside.

15.4 The Appellant's appeal against sentence succeeds in respect of the charge of attempted rape. The sentence imposed by the Regional Magistrate on attempted rape is set aside and substituted with the following:

"The Appellant is sentenced to six years imprisonment, two years of which are suspended for a period of five years on condition that the Appellant is not convicted of an offence under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, to which the Appellant is sentenced to direct imprisonment without the option of a fine, and which is committed during the period of suspension".

15.5 The Appellant's sentence on the charge of escaping from lawful custody is confirmed. It is ordered that the

sentence of 12 months imprisonment is to run concurrently with the sentence imposed on the attempted rape charge in para 15.4 above..

15.6 The sentence is antedated in terms of s282 of the Criminal Procedure Act, 51 of 1977, to 27 July 2007.

**SA MAJIEDT
JUDGE**

I concur:

**KJ MOLOI
ACTING JUDGE**

FOR THE APPELLANT : ADV T FOURIE
INSTRUCTED BY : JUSTICE CENTRE

FOR THE RESPONDENT : ADV W BAGANENG
INSTRUCTED BY : DPP