IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN CASE NO. CA & R 338/2016

In the matter between:

THEMBELANI MAKHANG **Appellant**

and

THE STATE **Respondent**

APPEAL JUDGMENT

Bloem J.

[1] The appellant was charged in the regional court, Aliwal North with rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.[1] Despite his plea of not guilty the appellant was convicted as charged. He was sentenced to life imprisonment. He now appeals against his conviction and sentence.

[2] To prove its case against the appellant the state called three witnesses. M. M., the complainant, testified that on Friday, 4 July 2014, at about 20h00 she was walking home with her two friends, R. N. and M. M., when they came across the appellant.

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[1] Criminal Law (Sexual Offences and Related Matter) Amendment Act, 2007 (Act No. 32 of 2007).

The complainant was walking behind her two friends. She heard the appellant enquiring about her whereabouts. R. said that she was behind them. She asked the appellant why he made enquiries about the complainant whereupon the appellant said that he was going to rape her. The three ladies walked together with the appellant following them. At one stage the appellant grabbed the complainant by her arm. He wanted to leave with her but she refused. He assaulted her by using an open hand across her face. R. tried to intervene. In an apparent attempt to scare him off she broke a beer bottle which the appellant had earlier given to her. M. was sent to call her elder brother.

[3] The appellant caused the complainant to fall to the ground. The appellant took off the complainant's pants and panty. As he was about to have sexual intercourse with the complainant, M. and R. returned with three men. The appellant drew a knife. The three men ran away. M. and R. left. R. said that she was going to call her elder brother. The appellant pulled the complainant to another spot behind a house where he once again undressed her, put on a condom and raped her vaginally. He then removed the condom and raped her anally. After the sexual intercourse with the complainant the appellant told her to accompany him to his house. As they were near a graveyard R., M. and some members of the community appeared. The appellant was told to let go of the complainant. He refused. The complainant fell and the appellant again assaulted her by using an open hand. He pulled her up and she managed to break free. She joined the group. The police arrived. The appellant, complainant, R. and M. were taken to the police station.

[4] Save for some contradictions, with which I shall deal later, R. and M. confirmed the complainant's version insofar as they were present when the appellant was with the

complainant.

[5] The appellant testified that he knew the complainant who was his neighbour. During the day in question he met her and proposed love to her. She accepted his proposal and agreed to meet him that evening at Sishuba's Tavern. He arrived at the tavern when it was about to close. He saw the complainant who was with R.. He approached the complainant and said "*that we ... can go now so as to sleep together*". R. remained behind as the two of them proceeded in the direction of his house. Before they reached his house they met with the complainant's friends who were with two young men. The two men wanted to assault the complainant because they did not like the idea that the complainant was walking with the appellant when she had a boyfriend who was looking for her. The police arrived. Her friends told the complainant to allege that she had been raped by the appellant. He was then arrested. The appellant denied that he raped the complainant.

[6] The magistrate convicted the appellant because he found that there was overwhelming evidence implicating the appellant and that his version was not reasonably possibly true. Mr Geldenhuys, counsel for the appellant, submitted that the magistrate erred in not taking into account a number of contradictions in the evidence of the three state witnesses. The contradictions that he referred to are that the complainant testified that the appellant assaulted her by using an open hand whereas R. testified that he used a fist on the complainant's chest; the complainant testified that it was only R. who tried to originally intervene whereas R. testified that it was M. who tried to intervene while M. did not testify that she attempted to intervene; only R. testified that one Mthunzi was on the scene, something about which neither the complainant nor M. testified about; the

complainant testified that she told M. to fetch help but that R. left first leaving M. behind whereas both R. and M. testified that it was M. who left first; and the complainant and M. testified that R. accompanied M. and the group who unsuccessfully tried to intervene whereas R. testified that she left to look for help after M. did not return. The submission was that the above contradictions materially detracted from the quality of the evidence adduced by the state and that the appellant should have been given the benefit of the doubt allegedly created by such evidence.

[7] Mr Zantsi, counsel for the state, acknowledged the above contradictions but submitted that they were not on material aspects of the evidence of the state witnesses and therefore did not detract from their credibility as witnesses.

[8] Despite the existence of the above contradictions I agree with the magistrate that the three state witnesses corroborated each other on the material aspects relevant to the commission of the offence in question. In my view, the above contradictions do not materially affect the credibility of any one of the state witnesses. In any event contradictions *per se* do not lead to the rejection of a witness' evidence and not every error made by a witness affects his or her credibility. I am satisfied that, when the magistrate made the finding that the state witnesses corroborated each other on the material aspects of the case, the magistrate had made an evaluation of all the evidence by taking into account the nature of the contradictions, their number and lack of importance and their bearing on other parts of the evidence of the three state witnesses.[2] I agree with Mr Zantsi that, if anything, the contradictions relied upon by Mr Geldenhuys are of the kind that could be expected of an honest but imperfect recollection, observation and reconstruction and show that the witnesses

[2] *S v Mkohle* 1990 (1) SACR 95 (A) at 98f-g.

did not conspire against the appellant.

[9] The appellant's version was correctly rejected by the magistrate as false. It is improbable that the complainant's friends who did not want her to be with the appellant would tell her to inform the police that she had been raped if they did not know what happened between the appellant and complainant prior to their arrival. The appellant contradicted what his attorney had put to the state witnesses. It was put to them that R. was one of those who did not like the idea of the complainant walking with the appellant. However it was the appellant's evidence that he and the complainant left R. behind at the tavern. It is more than a coincidence, on the appellant's version, that the police would arrive when the complainant's friends and the two men met him and the complainant. It is more probable that the police arrived because R. and M. sounded the alarm. The appellant denied that he had sexual intercourse with the complainant. The medical evidence showed bruising on her vagina and three fresh tears around her anus. On the evidence of the complainant the only inference to be drawn is that those injuries were caused by the appellant when he raped her.

[10] In the circumstances, the magistrate's rejection of the appellant's evidence as a pack of lies and his acceptance of the state's evidence cannot be faulted. The appellant's appeal against his conviction must accordingly be dismissed.

[11] Regarding sentence, Mr Geldenhuys made two submissions. The first was that the appellant was not properly warned that the minimum sentencing provisions of the Criminal Law Amendment Act[3] apply and he, therefore, did not have a fair trial. The second submissions was that, if it is found that there is no merit in the first

[3] Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

submission, the magistrate erred when he imposed life imprisonment when substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence of life imprisonment. Mr Zantsi submitted that the appellant had a fair trial and that the magistrate was correct to find that no substantial and compelling circumstances existed which would justify the imposition of a lesser sentence.

[12] In respect of the first submission, the appellant was informed at the commencement of the trial that the minimum sentence of life imprisonment might be imposed if he was convicted of rape because the state alleged that the complainant was assaulted and threatened with a knife during the commission of the offence. As correctly pointed out by Mr Geldenhuys, the facts stated by the state for its reliance on the applicability of the minimum sentence do not constitute a ground upon which the prescribed minimum sentence becomes applicable. The facts show that the appellant raped the complainant twice, once vaginally and the other time anally. In terms of item (a) (i) of Part 1 of Schedule 2 of the Criminal Law Amendment Act an accused may under those circumstances be sentenced to life imprisonment. Mr Geldenhuys submitted that in this case the appellant could not and should not have been sentenced to life imprisonment because he was not informed of the provisions of item (a) (i) of Part 1 of Schedule 2. In view of the conclusion that I arrived at in respect of the second submission, it is not necessary for me to make a finding on the first submission.

[13] The appellant did not testify in mitigation of sentence. His attorney informed the magistrate from the bar on 1 June 2016 that the appellant was 24 years of age, left school after standard 3, was single, has no children and was unemployed at the

time of his arrest. He has two previous convictions of assault with intent to do grievous bodily harm. On 18 June 2009 he was sentence to 50 hours' community service and six months' imprisonment totally suspended for 3 years on certain conditions and on 1 September 2011 he was sentenced to six months' imprisonment totally suspended for 3 years on certain conditions.

[14] Rape is a serious offence. It is a degrading, humiliating and brutal invasion of victim's most intimate, private space.[4] The appellant violated the complainant's bodily integrity against her will. She will in all probability live with the thought of having been violated for the rest of her life. Rape is very prevalent within the area of the trial court and this court. Rape is one of those offences for which the Legislature has ordained minimum sentences. What aggravates the rape in the present matter is that the appellant brazenly made his intentions clear from the time that he first met the complainant and her friends. That he said at that stage that he wanted to rape the complainant is not improbable, as submitted by Mr Geldenhuys. The complainant and her friends obviously did not take him seriously, especially if regard is had to the fact that R. accepted a bottle of beer from him thereafter and all of them walked in the same direction. He thereafter acted in accordance with his expressed desires when he first pulled the complainant on her arm and, after R. and M. went to look for assistance, attempted to rape her but had to stop when they returned. He pulled a knife which caused them to retreat. He took her to the spot where he raped her twice. The above facts speak of a violent person who intended to satisfy his carnal lusts at all costs.

[15] Members of society expect courts to impose heavy sentences on rapists, especially where the victims are women or children, lest the administration of justice may fall

[4] *S v SMM* 2013 (2) SACR 292 (SCA) at 299a-b.

into disrepute and members of society take the law into their own hands.[5]

[16] Sentencing is pre-eminently a matter for the discretion of the trial court. The power of a court of appeal to interfere with sentences imposed by lower courts is circumscribed. In this regard Khampepe J said in *S v Bogaards*[6] that a court of appeal can interfere with sentences only:

> *"...where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."*

[17] The magistrate found that no substantial and compelling circumstances existed which would have justified the imposition of a lesser sentence than imprisonment for life. In this regard I have considered what Marais JA said in *S v Malgas*[7], namely that:

> " *... a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.*"

[5] *R v Karg* 1961 (1) SA 231 (A) at 236B.
[6] *S v Bogaards* 2013 (1) SACR 1 (CC) at 14d-e.
[7] *S v Malgas* 2001 (1) SACR 469 (SCA) at 478d-h.

[18] A reading of the judgment suggests that, because the magistrate did not find the existence of substantial and compelling circumstances, the sentence of life imprisonment had to follow. The magistrate did not consider whether, in the circumstances of the case, life imprisonment was proportionate to the offence committed by the appellant. In *S v SMM* (*supra*) Majiedt JA held at 299d-e that the advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing.

[19] In my view, despite the appellant's violent behaviour that night, this is not the most severe form of rape. The medical report reflects bruising around the vagina and three fresh tears around the anus. Save for the above injuries, the complainant did not testify that she suffered any other injuries or that she is presently traumatised by the event, other than the trauma that inevitably goes with rape.

[20] When the circumstances under which the offence was committed are weighed up against the appellant's personal circumstances and society's expectations, I am of the view that the imposition of a sentence of life imprisonment is so disproportionate to the offence that interference by this court is justified. The sentence must accordingly be set aside. Mr Geldenhuys submitted that the appellant should, in the event of the sentence of life imprisonment be set aside, nevertheless be imprisoned for a lengthy period. I agree. The appellant's violent behaviour and his general conduct towards the complainant justify such lengthy period of imprisonment. The circumstances of this case would justify a sentence of 15 years' imprisonment. Such sentence would, in my view, fit the interests of society, the appellant and the

nature of the offence. The following words of Nugent JA in *S v Vilakazi*[8] where the complainant, who was older than 14 and not older than 16 when she was raped twice by a 30 year old male, are apposite in this case:

> "*A substantial sentence of 15 years' imprisonment seems to me to be sufficient to bring home to the appellant the gravity of his offence and to exact sufficient retribution for his crime. To make him pay for it with the remainder of his life would seem to me to be grossly disproportionate.*"

[21] The appellant has been serving his sentence since 1 June 2016 when he was sentenced. The sentence should be antedated accordingly.

[22] For the above reasons the following order is made.

22.1. The appeal against conviction is dismissed.

22.2. The appeal against the sentence of life imprisonment is upheld.

22.3. The sentence imposed by the magistrate is set aside and replaced with the following:

"The accused is sentenced to 15 years' imprisonment."

22.4. The sentence is antedated to 1 June 2016.

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G H BLOEM
Judge of the High Court

Beshe J,

I agree

[8] *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 574g-h.

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N G BESHE
Judge of the High Court

For the appellant:	Adv D P Geldenhuys of the Grahamstown Justice Centre, Grahamstown.
For the state:	Adv P Zantsi of the office of the Deputy Director of Public Prosecutions, Grahamstown.
Date of hearing:	15 March 2017
Date of delivery of the judgment:	22 March 2017