IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: GRAHAMSTOWN)

CASE NO: CA 162/2018

In the matter between:

NKOSEKHAYA BUSAKWE 1ST APPELLANT

SIVUYILE BURWANA 2ND APPELLANT

AND

THE STATE RESPONDENT

EX-TEMPORE

FULL BENCH OF APPEAL JUDGMENT

DAWOOD, J:

1. The First Appellant, the 7th accused in the court *a quo*, was convicted of rape of L T, and sentenced to 18 years' imprisonment.
2. The First Appellant was granted leave to appeal against the sentence of 18 years' imprisonment, by the Supreme Court of Appeal.
3. It is trite that an Appeal Court's power to interfere with a discretionary sentencing power of a court *a quo* is circumscribed.
4. It is established law that an appeal court does not have unfettered power to interfere with the sentence imposed by a trial court. This is because the

trial court exercises a strict or narrow discretion in respect of sentencing, and an Appellate court would accordingly only interfere if there has been a misdirection or the sentence imposed by the trial court and that which the appellate court would have imposed is so disparate that the only inference is that the trial court did not exercise its sentencing discretion properly[1].

5. In this matter it has been correctly conceded by the State that the court *a quo* erred in imposing a sentence of 18 years' imprisonment.
6. It has been correctly argued by the Appellants' counsel, that the court a quo has treated the matter as if the rape was committed within the parameters of Section 51 (1) of the Criminal Law Amendment Act 105 of 1977, where the minimum sentence of life imprisonment is ordained.
7. It was argued that the offence in fact falls within the ambit of Section 51 (2) (b) (i) of the Criminal Law Amendment Act 105 of 1977 with the prescribed minimum sentence of 10 years' imprisonment for a first offender.
8. The Appellant is a first offender and the offence falls under Part III of Schedule 2.
9. There is no reason given why an increased sentence of 18 years imprisonment was imposed in respect of the First Appellant.
10. The minimum sentence already takes into account the fact that the First Appellant is a first offender and accordingly there is no reason to take that into account as a substantial and compelling factor.
11. The heinous opportunistic nature of the rape, the degradation caused to the complainant by attempting to paint a picture that she had consensual

[1] *S v Monyane and Others* 2008 (1) SACR 543 (SCA); see also *S v Shapiro* 1994 (1) SACR 112 (A) at 119 j – 120 C; *Blank v The State* 1995 (1) SACR 62 (A) and *S v Malgas* 2001 (1) SACR 469 (SCA).

sex with him in circumstances when she had just been gang-raped, demonstrates a lack of remorse and a callousness.

12. This is clearly an aggravating circumstance that demonstrates that the First Appellant did not take responsibility for his actions which would be the first step for him being considered for rehabilitation.

13. There is nothing in his personal circumstances which constitute substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of 10 years' imprisonment in this case.

14. In *Dyakophu*[2] it was emphasised that:

> *"...*Binns-Ward J *in S v Tafeni ... said that while the determination of an appropriate sentence entails the exercise of a judicial discretion in the narrow or strict sense, when deciding the question as to whether or not substantial and compelling circumstance exist, the trial court exercises a wider discretion. The latter issue is accordingly subjected to much greater scrutiny by an appellate court, in order to determine whether the reasons provided for the finding are supported by the evidence. That issue must nevertheless be considered with "due heed to the discretionary nature of the decision by the lower court, even if in the wide sense of the concept". An appellate court's power to interfere with a trial court's finding regarding the existence of substantial and compelling circumstances is accordingly* ***not limited only to cases where there has been a misdirection or failure to exercise the sentencing discretion properly.*** *(My emphasis.)*
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> *"Our law recognises the fundamental difference between the exercise of a strict or narrow discretion as opposed to a wider one, and the approach that an appellate court must adopt to adjudicate challenges to either. (See in this regard the authorities cited in S v Tafeni (supra). When exercising a narrow discretion to determine an appropriate sentence, the trial court is required to weigh up a number of possible sentencing options.*
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> *In choosing a particular sentence it is exercising a strict discretion which can only be interfered with in the abovementioned limited circumstances. The determination regarding the existence or absence of substantial and compelling circumstances is, however,* ***essentially a factual enquiry which is either right or wrong****. It is for this reason that a trial court's finding in this regard must be subjected to more exacting scrutiny, and the* ***power of an Appellate Court to interfere cannot be limited to those grounds that apply to the consideration of an appropriate sentence****. I am accordingly in respectful agreement with the views expressed by Binns-Ward J in S v Tafeni (supra). (My emphasis.)*

[2] *Dyakophu v The State* (ECG) unreported case no CA257/2017 of 6 June 2018 at para 10, 11 and 12

"Where the sentence appealed against was imposed in circumstances where a prescribed sentence was applicable and where the issue of substantial and compelling circumstances was involved the approach on appeal will, however, be different". [Footnotes omitted.]

"The approach which a trial court must adopt when determining the issue of whether substantial and compelling circumstances are present in a particular case is well established in our law. They can be summarised as follows:

a) The factors which traditionally play a role in sentencing namely, the personal circumstances of the accused, the nature and severity of the crime, and the interests of society continue to play a role;
b) The prescribed minimum sentences must be used as point of departure in all cases where they are of application and should not be departed from lightly or for flimsy reasons; and
c) The ultimate question is, whether having regard to the above-mentioned triad of factors, the imposition of the minimum sentence would be so disproportionate, that it would result in an injustice, in which event the court must impose a lighter sentence. (S v Malgas 2001 (1) SACR 490; S v Vilakazi 2009 (1) SACR 552 (SCA)".

15. The sentence of 18 years' imprisonment imposed by the court *a quo* warrants interference as it exceeds the prescribed minimum sentence without any reasons therefor being furnished and is disproportionate particularly having regard to the sentences of the other accused who were convicted in respect of the gang rape, yet were given lesser sentences that the First Appellant who was not a participant in the gang rape and was in fact convicted of a single incident of Rape.
16. The prescribed minimum sentence of 10 years' imprisonment is appropriate and does not warrant a deviation as there are no substantial and compelling circumstances present in this case.
17. The sentence of 18 years' imprisonment in respect of the First Appellant, accused number seven (7) in the court *a quo*, should accordingly be set aside and a sentence of 10 years' imprisonment be substituted therefor with effect from the date of sentencing, being the 18th of December 2015, in respect of count 10, rape of L T.
18. I now turn to the Second Appellant.
19. The Second Appellant was convicted of the rape of P G, in count 11.

20. He was granted leave to appeal by the Supreme Court of Appeal against his conviction of Rape.
21. The Second Appellant was charged in respect of the second rape incident, that of P G.
22. There are numerous areas of contradictions in respect of this rape incident by P herself in that, *inter alia*:
    a) She initially testified that she was raped on three occasions, by the Second Appellant and thereafter stated that it was on two occasions despite going into elaborate details initially regarding the third incident;
    b) She only mentioned this incident of rape in a statement taken a year after the incident, which was her fourth statement;
    c) She initially stated that the Second Appellant told her his name and that of the First Appellant and then stated that he did not do so and she heard his name when the First Appellant called him after the rape incident;
    d) She also only mentioned the first rape incident, being gang rape by 6 men to the doctor;
    e) She did not state inform the police at the first identity parade that the Second Appellant, the perpetrator of the second rape incident, was still at large and he had not been arrested along with the other perpetrators;
    f) In her fourth statement where she mentions the second rape incident she indicated that she was raped by both the First and Second Appellants; and
    g) In her fifth statement she stated that she was raped by the First Appellant and the Second Appellant raped L T;
23. The state counsel further highlighted other contradictions as set out in paragraphs 11 to 14 of her response to the Appellants' Heads of Argument as follows:

"11. The complainant, P G, further contradicted herself in respect of how many locations she was raped by Appellant 2. She testified that Appellant 2 had raped her, she got dressed, she moved to a second location with Appellant 2 where he again raped her. P G then testified that she was only raped at the one location.

12. The Complainant, P G, further contradicted herself in respect of when she would have seen L naked. P G testified that she saw L naked after she herself had been raped, and was on her way walking back. At a later stage she changed her evidence, stating that she saw L after she had been raped by Appellant 2 for the first time, when he wanted to rape her the second time.

13. The complainant, P G, contradicted the state witness, K W M. P G testified that K W M informed her that they were going to the house of Kwekwe on the day of the pointing out of Appellant 2. This was denied by K W M, who testified that he did not inform her as mentioned. The complainant, P G, further testified that she was only raped by Appellant 2 and not Appellant 1. K W M testified that Phumla G informed him that she was raped by both Sivuyile Luwana and Mabuti.

14. P G contradicted the state witness, P T. P G testified that the group, including P, was approximately 6 metres away from them when Appellant 1 and 2 approached her and L. P T testified that she saw Appellant 2 in the yard of the shack."

24. The Second Appellant denies that he was present at the second incident. He however stated that because of the lapse of time prior to his arrest he could not recall where he was.

25. There clearly are material discrepancies between the complainant's statements and her testimony with regard to the rape incident perpetrated by the Second Appellant, and contradictions between her testimony and that of some of the other state witnesses.

26. I find it highly unlikely that the complainant lied about the Second Appellant being the perpetrator of the second rape incident.

27. However, the discrepancies in the evidence and her statement, as well as between her version and that of the other complainant and her sister, P, is sufficient to give rise to reasonable doubt, as to whether or not the State has discharged the onus resting upon it to establish the guilt of the Second Appellant beyond a reasonable doubt, in respect of the rape charge

28. It is probable that the Second Appellant committed the rape but the State, as correctly conceded, had failed to establish his guilt beyond a reasonable doubt having regard to all the evidence presented and the various statements obtained from the victim, as well as from the testimony of the other State Witnesses.
29. The learned Judge accordingly erred in finding that the state had discharged the onus resting upon it.
30. The conviction of the Second Appellant and in respect of count 11, that of the Rape of P G, according falls to be set aside.
31. The Second Appellant is accordingly acquitted in respect of count 11, that of the Rape of P G.
32. The following order is accordingly made:
    a) The Appeals in respect of both the 1st and 2nd Appellant succeed, in that:
        (i) The 1st Appellant's sentence of 18 years' imprisonment is set aside and substituted with a sentence of 10 years' imprisonment, antedated to the 18th of December 2015 in respect of count 10, that of rape of L T.
        (ii) The conviction in respect of the 2nd Appellant in respect of count 11, that of rape of P G, is hereby set aside.

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F. B. A. DAWOOD

JUDGE OF THE HIGH COURT

I AGREE:

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G. H. BLOEM
JUDGE OF THE HIGH COURT

I AGREE:

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M. S. JOLWANA
JUDGE OF THE HIGH COURT

DATE HEARD:	29 JANUARY 2019
DATE HANDED DOWN:	29 JANUARY 2019
FOR THE APPELLANTS':	MS E. THERON
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