IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal number: **A114/18**

In the matter between:

SIMPHIWE M VALASHIYA **Appellant**

and

THE STATE **Respondent**

CORAM: REINDERS, J *et* CHESIWE, J

JUDGMENT BY: CHESIWE, J

HEARD ON: 3 SEPTEMBER 2018

DELIVERED ON: 20 SEPTEMBER 2018

JUDGEMENT

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[1] The appellant was convicted in the Regional Magistrate court in Welkom on charges of theft, (the original charge was that of robbery with aggravating circumstances) and rape. He was sentenced to five years imprisonment for the theft and twenty years for the rape charge. The five year jail term was wholly suspended on conditions.

[2] The appellant was represented by Mrs Smith from the Legal Aid Board Bloemfontein and the respondent was represented by Advocate Botha from the offices of the National Director of Public Prosecution.

[3] The trial court refused appellant leave to appeal against conviction and sentence. On petitioning the Judge President of the above Honourable court, the appellant was granted leave to appeal against his sentence. Leave to appeal lies against the sentence of twenty years.

[4] The complainant testified at the trial court that in the early morning hours of the 4th April 2009, she was asleep in her house with her child when she was disturbed by two intruders who woke her up. The two intruders raped her, appellant being one of the intruders. (Appellant was accused 2 at the trial court). The complainant also lost property that was stolen by the intruders to the value of seventeen thousand rand. The appellant at the trial court raised a defence that he and the complainant had a love affair since 2000, and that he had sex with the complainant on 3rd April 2009 and not 4th April 2009 as claimed by the complainant. According to the appellant the

complainant became angry with him because he did not give her money for an identity document and shoes.

[5] The appellant is positively to the rape of the complainant through DNA.

[6] Mrs Smith on behalf of the appellant submitted in oral argument that the court erred in the application of the prescribed minimum sentence as the appellant had compelling and substantial circumstances, in that the appellant is a first time offender and he was in custody for four years. She submitted that the sentence imposed cannot stand, must be set aside and a competent sentence be imposed. Counsel submitted that sentence of seven (7) years will be more appropriate.

[7] Mr Botha on behalf of the state conceded that the court need to re-consider the appellant's sentence as the trial court has erred by not taking into account the four years the appellant spent in custody. Mr Botha also conceded that the seven years will be an appropriate sentence in this instance.

Ad Sentence

[8] As regards sentence the appellant based the appeal on the following grounds: that twenty years imprisonment is strikingly inappropriate in that it is out of proportion and excessive in the circumstances and induces a sense of shock. The trial court should have taken into account the period the appellant spent in custody awaiting trial the court and therefore the trial court erred by not imposing a shorter term of imprisonment in view of the appellant's personal circumstances, prospects of rehabilitation, severity of the offence and the interests of society.

[9] The respondent conceded that the court a quo erred in not finding that compelling and substantial circumstances existed and therefore misdirected itself with regard to the approach it had in terms of the prescribed minimum sentence.

[10] It is trite that a court of appeal will not lightly interfere with the sentencing discretion of the trial court unless the sentence imposed was shockingly inappropriate. In **S v Makhando 2002 (1) SA** at 431 E-F SCA, the court contented that the appellant's incarceration for a period of two years awaiting trial is a factor that must be considered by a court to deviate from the prescribed minimum sentence. In **S v Stephen and Another** 1994 **(2) SACR 163 (W)** the court was of the view that the appellant was a first offender and productive member of the community, and this should have moved the court to a finding of the existence of substantial and compelling circumstance that would empower the court to deviate from the imposition of the prescribed minimum sentence.

[11] In order to determine whether in a particular case substantial and compelling circumstances exists, a court has to follow the guidelines as set out in **S v Malgas 2001 SACR 469 SCA** at 482 and consider the trite triad factor propounded in **S v Zinn 1969** (**2) SA 537 (A)** relevant to the sentence the crime, the criminal and the interests of society.

[12] A court of appeal may interfere with the sentence imposed by the trial court only where the sentence imposed is so disproportionate to the crime committed that it is injust or where the trial court in sentencing the offender failed to exercise discretion properly or exercised it unreasonably.

[13] In my view, correctly submitted by the legal representative on behalf of the appellant, the court approached the sentencing of the offender without taking into account the four years spent in custody awaiting trial, the appellant was a first offender, had a child

and he contributed to the child's maintenance, was relatively young at the time of being sentence and thus warrants this court to tamper with the sentence imposed by the trial court.

[14] A lengthy period in custody constitutes a substantial mitigating factor warranting a departure from the prescribed minimum sentence**. (See S v Vilakazi 2009 (1) SACR 552 (SCA)** and **S v Kruger 2012 (1) SACR 369 (SCA).)**

[15] It is only fair to consider the period spent in custody where it is a lengthy period. In the present case the appellant was incarcerated for a period of four years, and oneway of factoring in this period into a the sentence is by ante-dating the sentence to the date on which appellant was sentenced or by simply deducting the four years from the imposed sentence. I am therefore satisfied that overall, if regard is had to the totality of aggravating and mitigating circumstances, including the lengthy period of four years in custody, substantial and compelling circumstances are present to reduce the minimum sentence of 20 years imprisonment.

[16] In view of the aforesaid, I am persuaded that the trial court misdirected itself and the sentence warrants to be tampered with by this court.

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

1. The appeal against sentence succeeds.

2. The sentence of twenty (20) years imprisonment imposed on the appellant is set aside and is substituted with the following sentence:

   2.1 The accused is sentenced to 10 years imprisonment in respect of count 2.

   2.2 The sentence must be deemed to have been imposed on 11 December 2013

   in terms of section 282 of the Criminal Procedure Act 51 of 1977.

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S CHESIWE, J

On behalf of appellant:
Instructed by:

On behalf of respondent:
Instructed by: