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**

Case Number: A107 /2019

T T AND ANOTHER Appellants

and

THE STATE Respondent

CORAM: **MUSI, JP *et* MBHELE, J**

JUDGEMENT BY: **MBHELE**, J

HEARD ON: **4 NOVEMBER 2019**

DELIVERED ON: **31 JANUARY 2020**

---

[1] The appellants were convicted by the Regional Magistrate, Bethlehem, of four counts: viz robbery with aggravating circumstances, compelled sexual assault, rape (1st complainant) and compelling a person who is 18 years or older to witness a sexual offence. They were both sentenced to 15 years imprisonment, 7 years imprisonment, Life imprisonment and 7 years imprisonment for the respective crimes, on 12 March 2018. Aggrieved by both the convictions and sentences, the appellants approached this court on appeal. They exercised their automatic right to appeal due to the life sentences.

[2] In their notices of appeal the appellants contended that the court a *quo* erred in finding that the state proved its case beyond reasonable doubt. They further contended that the trial court erred in finding that the state witnesses were credible and that it also erred in rejecting their testimonies.

[3] On 05 November 2017 the 1st complainant and her boyfriend (2nd complainant) were on their way from a tavern when they were accosted by the appellants. The appellants were armed with Okapi knives. The appellants covered their faces with a beanie and a balaclava respectively to hide their identities. They searched the second complainant and removed cash and 3 cell phones from his possession. They took the two complainants to a shop near a place called circle 2. On their arrival at the said shop they instructed the two complainants to have sexual intercourse with each other in their full view

[4] At their command, the first complainant lied down, took off her underwear and the second complainant lied on top of her pretending to be engaging in sexual intercourse with her. The second appellant noticed that they were simulating sex, he put his hand in between their genitals and instructed the second complainant to get off the first complainant so he could show him how sex is performed. He then took out his penis and had sexual intercourse with the first complainant while her boyfriend was watching. He thereafter instructed the complainant to rise so that they could walk to a suitable spot for proper sexual intercourse. They walked with her until they reached a grave site near a school where they both had sexual intercourse with her interchangeably without her consent.

[5] They thereafter took her to Cynthia tavern. When they got to the tavern the appellants uncovered their faces. The first appellant went into the tavern to buy liquor while the second appellant stayed behind with the first complainant.

[6] At the tavern she saw one S, a boy who is known to her. When the first appellant came back he reported that S asked him where they were coming from at that hour of the night. They then left the tavern to accompany her home.

[7] On their way home they saw a police vehicle approaching with the second complainant inside. The second complainant pointed the appellants out to the police. The police arrested the first appellant immediately while the second appellant ran and hid himself at a

house near Mpuse's shop. The police found him and apprehended him.

[8] The second complainant testified that he was employed at Java's tavern on the night of the incident. He was with the first complainant when he left the tavern at around 1 a.m. At the gate of the tavern they were accosted by the two appellants. Threatening him with knives, they took his phones and instructed him to remove the security pins from the phones. After the second appellant had sexual intercourse with the first complainant the first appellant removed the second complainant's shoes from his feet and took them away.

[9] They left the scene with the first complainant and instructed him to look away. They threatened to kill his girlfriend should he turn his head and look towards them. After a while he walked away. He saw a police vehicle and reported the incident to the police. They went around in the police vehicle searching for the complainant until they spotted her in the company of the appellants near Mpuse's shop. The police apprehended the appellants. The first appellant was found wearing the second complainant's shoes. His 3 cell phones were also recovered from the appellants.

[10] Sechaba Mule, a police officer employed at the Bethlehem Community Service Centre was on patrol around Bohlokong when he met the second complainant near extension 2. He received a report that 2 unknown men robbed the second complainant of his cell phones and took his girlfriend away. Two hours later they saw

the first complainant in company of two men whom the second complainant identified as their assailants. They apprehended them and found a balaclava. They also found 2 cell phones and a pair of adidas sports shoes which the second complainant identified as his property. The first complainant reported to him that she was raped by both the appellants.

[11] The appellants deny any wrongdoing. Their version is that the first complainant was the first appellant's girlfriend. On the night of the incident he received a call from the first complainant requesting him to fetch her from Java's tavern. He proceeded to the tavern with the second appellant and found the first complainant in company of the second complainant. He was not pleased with what he saw and a scuffle ensued between the first appellant and the second complainant. The second complainant fled the scene and the appellants proceeded to Cynthia's tavern with the first complainant where they enjoyed alcohol together. Some hours later they left the tavern to accompany the first complainant home. They were then confronted by police who arrested them.

[12] Mr. Van der Merwe, on behalf of the appellants, conceded that there are no valid grounds for the appeal. He was unable to show how the magistrate erred in coming to the conclusion that he arrived at.

[13] The trial court evaluated the evidence and came to the conclusion that the state witnesses were truthful and rejected the version of the appellant as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they

are shown to be wrong with reference to recorded evidence. The acceptance by trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection. (See **S v Francis** 1991 (1) SACR 198 SCA at 204 e-d.) A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. (See ***R v* Dhluwayo** *&* **another** 1948 (2) SA 677 (A) at 705-706).

[14] The powers to evaluate and appraise evidence belong to a trial court which had an opportunity to see and hear witnesses and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion. The trial court's advantage of seeing and hearing witnesses places it in a better position to assess the evidence, and such assessment must take precedence unless there is clear and demonstrable misdirection.

[15] The complainants' account of the events was clear and straight forward. Their versions were corroborated by Mule, the arresting officer and the medical report. Mule said that the first complainant was crying and distraught when they found her in company of the appellants. She reported that she was raped at the first available opportunity. The medical report confirms that the scarring on her posterior fouchette is consistent with penetration. The second pair of shoes found in possession of the first appellant was identified by the second complainant as his that was forcefully taken from him.

[16] The appellants' account of events is riddled with serious contradictions and improbabilities. They were unable to explain

how the second complainant's shoes and cell phones landed in their respective possessions.

[17] I am unable to find any demonstrable or clear error on the part of the trial court to justify interference with its credibility findings. The trial court was correct in its assessment of evidence and credibility findings. I cannot find that the trial court erred in finding that the appellants' version is inherently improbable and fell to be rejected.

[18] It is trite law that the imposition of sentence remains the domain of the trial court and this involves the exercise of discretion by that sentencing court. A court exercising appellate jurisdiction is not free to interfere with the exercise of that discretion unless it is tainted by a material misdirection or the sentence is so disproportionate to the crime, the personal circumstances of the appellant and the interest of society. See *(S* **v Rabie 1975 (4) SA 855 (A) AT 857 D-E also S v De Jager and Another 1965 (2) SA 616 (A)**

[19] In the case of **S** v **Jiminez 2003 (1) SACR 507 at 512** the court said:

> "However, even where a sentence does not seem shockingly inappropriate, a court on appeal is entitled to interfere or at least to consider the sentence afresh, if there has been a material misdirection in the exercise of the sentencing discretion"

[20] It is so that a mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with a sentence imposed by a trial court. It must be material.

[21] In the matter of **S v Pillay** 1997 (4) SA 531 (A) at 531 the court said the following:

> "it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[22] The court a quo has set out in detail the factors it took into consideration in order to come to the sentence it imposed.

[23] There is no doubt that the offences committed by the appellants are very serious. The complainants were violated and humiliated to the extreme. They were ordered by complete strangers to perform sexual activities while they were watching. Thereafter the second appellant had sexual intercourse with the first complainant in the presence of her boyfriend. As if that was not enough, they later took her to a secluded place where they violated her even further.

[24] The trial court correctly considered the appellants' personal circumstances and found no weighty justification to depart from the prescribed minimum sentences in counts 1 and 3. There was nothing unique about their personal circumstances. They were both 27 years of age, unemployed and first offenders. The first

appellant is an unmarried father of a 4 year old child while the second appellant is married with a 7 year old child.

[25] In ***S* v Malgas 2001 (1) SACR 469 SCA** it was held that courts are required to regard the sentences prescribed in terms of section 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) as "being *generally appropriate'* for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.

[26] The sentence must fit the crime and the offender. The mitigating factors and personal circumstances of the appellants wane when compared with the seriousness of the offences and the brutality with which they were committed. When weighing up the mitigating factors against the aggravating circumstances, this matter, the interest of community as well as the provisions of section 51 of the Act, I am not persuaded that the sentences imposed are unjust. I am of the view that the trial court exercised its discretion judiciously. There is no justifying cause for us to interfere with the sentences. The appeal ought to fail.

ORDER

[27] The following order is made:

The appeal against the convictions and sentences is dismissed.
The convictions and sentences are confirmed.

_____
N.M. MBHELE, J

I concur.

_____
C.J. MUSI, JP

On behalf of the appellant:	Mr. P.L. Van Der Merwe Instructed by: Justice Centre BLOEMFONTEIN
On behalf of the respondent:	Adv. Steyn Instructed by: Director: Public Prosecution BLOEMFONTEIN