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IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. A403/13

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

14 MAY 2014 _____

In the matter between:

JUSTICE MAKAMO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MONAMA J

- [1] On 8 August 2012 the appellant was convicted by the Regional Magistrate's Court, Johannesburg on three counts of rape and one count of robbery. He was sentenced to an effective life imprisonment pursuant to the provisions of s 51(2) of Act 105 of 1997.
- [2] He was represented at trial. On 9 May 2013 he was granted leave to appeal the sentence only.
- [3] The State led evidence of Dr Lufuma Lukanda Kuya, the medical expert, the complainant, L[...] P[...] M[...], K[...] M[...], a teacher who knew and taught the complainant at school and M[...] R[...] R[...]. The accused testified in his defence during the trial which included trial within trial.
- [4] What follows is a brief exposition of the relevant evidence. The complainant testified that in the early evening on 6 May 2010 she met the appellant after she alighted from a taxi in Wanderers and Bree Streets, Johannesburg. She asked the appellant for some directions to Queen Elizabeth Bridge in Braamfontein. The appellant offered to walk her to her destination. On the way the appellant and other unknown persons raped her repeatedly in the bushes and in the parked train coaches in the Braamfontein trains' precinct. The appellant also robbed her of her belongings. She sustained injuries as identified on form J88¹. Her injuries were corroborated by Dr Kuya who conducted the gynaecological assessment on her. The complainant testified about the appellant's arrest and how her property was recovered. Her evidence about the arrest of the appellant and recovery of her goods was corroborated by Mr M[...] who knows the complainant very well. Mr M[...] testified that he was in the

¹ See page 5 of the Record.

area and heard the complainant's screams. He witnessed the apprehension of the appellant. The trial court found them reliable and credible.

- [5] The imposition of an appropriate punishment is pre-eminently a matter within the discretion of the trial court². The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by any irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court³.
- [6] The trial court rightly rejected the appellant's version as improbable. He testified that he met the complainant at a tavern in Bree Street, Johannesburg. During their encounter the complainant agreed to sell him sex. This is highly unlikely and is not supported by the evidence. In my view, the conviction was proper and stands to be confirmed.
- [7] In determining an appropriate sentence, the court has to take into account the nature of the crime, the personal circumstances of the appellant and the interest of society⁴. With respect to the nature of the crime, it is notable that the appellant was convicted of the serious offence of rape. In *S v Chapman* rape was described as follows:

*"...a very serious offence, constituting as it does a humiliating, degrading, brutal invasion of the privacy, the dignity of the victim."*⁵

² *S v Obisi* 2005(2) SACR 350 WLD.

³ *S v Sadler* 2000(1) SACR 331 SCA and *Director of Public Prosecution KZN v P* 2006 (1) SACR 243 SCA.

⁴ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

⁵ 1997 (3) SA 341 SCA at 344.

In casu, the appellant committed three counts of rape. The victim was injured in the process. She was seven weeks pregnant at the time. It can be reasonably inferred that she was traumatised. On top of that she was also robbed of her belongings. In these circumstances the sentencing regime as enshrined in the Criminal Law Amendment Act applies.

- [8] In addition to prescribing a minimum sentence of life for rape, the Act also prescribes a minimum sentence of 15 years imprisonment for robbery. The sentences are prescribed and not mandatory. The court may impose a lesser sentence if it finds that there are substantial and compelling circumstances justifying a lesser sentence.

- [9] *In casu*, the trial court said:

*“- when I look at the nature of the offence and the manner in which the crime was committed, I found no real mitigating circumstances...”*⁶

Furthermore, the said court also stated that:

*“In my view the fact that the accused has spent 2 and half years in custody while awaiting sentence is an important factor, but cannot be regarded as so important that it would give a reason to deviate from the minimum sentence.”*⁷

⁶ Line 7 to 10 Page 179 of the Record

⁷ Line 15 to 18 of Page 182 of the Record

I understand the above statement to convey that the trial court found no substantial and compelling circumstances. As such it was within its rights to impose the prescribed sentence of life imprisonment for rape and 15 years imprisonment for robbery.

- [10] In doing so, the trial court did not overlook the personal circumstances of the appellant. In considering the appellant's personal circumstances, the court noted that he was in his early twenties when he committed the offences. He originated from Mozambique and lost his father. However, these were outweighed by the brutal nature of the offence committed on a fairly young lady whose only fault was to be in the City of Johannesburg. The complainant was repeatedly raped in the stationary train.
- [11] With respect to the interest of the society, it is my view that society is under siege. The offences of rape and robbery are rife in the community. The perpetrators were brazen. They took turns in raping an innocent young lady. They attacked her in a public space. The current penalty regime appears not to be succeeding in stemming the tide of rapes and robberies. Since 1997 and with the promulgation of the Criminal Law Amendment Act, the expectation was the decline of these offences. On the contrary there has been an increase in the number of these offences that are committed.
- [12] The public expects and demands that the appellant is properly punished. The mitigating factors are grossly outweighed by the aggravating circumstances. The complainant was harassed by the appellant and his family. Poonan JA recently lamented the reticence to impose the minimum sentence. He stated that:

“-Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as “relative youthfulness or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness. Predictable outcomes not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.”⁸

The youth of the appellant cannot be used to circumvent the imposition of an appropriate sentence. The sentence is harsh but it befits the crimes.

[13] In the circumstance I found no misdirection. Accordingly, I make the following order:

13.1 The appeal is dismissed and the conviction and sentence are confirmed.

RE MONAMA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

TL MOSIKATSANA
ACTING JUDGE OF THE HIGH COURT

⁸ S v Matyityi 2011 (1) SACR 40 SCA at 53 E –F.

GAUTENG LOCAL DIVISION, JOHANNESBURG**Appearances**

Counsel for the Appellant:	Ms M Botha
Instructed by:	The Justice Centre, Johannesburg
Counsel for the Respondent:	Adv. AM Williams
Instructed by:	The Director of Public Prosecutions, Johannesburg
Date of hearing:	11 March 2014
Date of judgment:	14 May 2014