IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ***Yes***
Date: ***7th September 2018*** Signature: _____

APPEAL CASE NO: A75/2018
COURT *A QUO* CASE NO: RC310/2015
DPP REF NO: 10/2/5/1-(2018/75)
DATE: 7th September 2018

In the matter between:

CHIRINDA: MOSES Appellant

- and -

THE STATE Respondent

JUDGMENT

ADAMS J:

[1]. This is an appeal by the appellant, who was legally represented during the trial in the court *a quo*, namely the Randburg Magistrates Court for the Gauteng North Regional Division (Regional Magistrate Pretorius), against both his convictions and sentences. He pleaded not guilty to the two charges against him and gave no plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 ('the CPA').

[2]. On the 8th of November 2017 the appellant was convicted as follows:

2.1 Count 1: Housebreaking with intent to rob and robbery with aggravating circumstances, read with the provisions of section 262(1) and section 260 of the Criminal Procedure Act 51 of 1977 ('the CPA') and sections 51(2), 52(2) and 52B of the Criminal Law Amendment Act 105 of 1997 ('the CLAA');

2.2 Count 2: Sexual assault (attempted rape).

[3]. On the 12th of December 2017 the appellant was sentenced as follows:

3.1 Count 1 (Housebreaking with intent to rob and armed robbery): ten years direct imprisonment.

3.2 Count 2 (Sexual Assault): Eight years direct imprisonment.

3.3 It was ordered that five of the eight years of the sentence imposed in respect of Count 2 was to run concurrently with the sentence of ten years imposed in respect of count 1, thus resulting in an effective sentence of thirteen years direct imprisonment,

[4]. This appeal is with the leave of the court *a quo*.

[5]. The appeal principally turns on the reliability of the evidence identifying the appellant as the person who late on the evening of the 8th of August 2015 broke into the house of the complainant and thereafter robbed and attempted to rape her.

[6]. At about 19:00 on the evening of the 8th of August 2015 the complainant, who was housesitting for her employers at their home in Olivedale, was confronted by a knife wielding intruder whilst in the house in the passage just outside her bedroom. He forced the complainant back into her bedroom and robbed her of a number of items, notably a laptop, cell phones and cash of approximately R2000. The complainant also during this time established that the intruder had already helped himself to the TV set that she had been watching earlier on the evening. Thereafter, the complainant was sexually assaulted by the intruder in the garden of the property. This he did by undressing her and by forcing his penis between her thighs. Before the sexual assault the complainant and her assailant had gone back into the house to get a condom, which she had persuaded her attacker to use during the sexual assault on her person. Just before they went into the house the assailant, who up to that point had covered his face with a balaclava, took it off, thus exposing his face and affording the complainant an opportunity to see his face. After retrieving the condom they went back to the garden and the attacker, after putting on the condom, attempted to have intercourse with her. She resisted by closing her legs. This annoyed the assailant, who shouted at the complainant, and this drew the attention of the family dogs, which came from the front of the yard and interrupted the assault on the complainant, who took the dogs into the house, whereafter the intruder left the scene.

[7]. During her evidence, the complainant explained that her attacker was wearing a 'blue work suit', a balaclava and hand gloves. He was also armed with a knife, which she described as one with a red handle and a silver blade. She confirmed that when the attacker took off his balaclava she was able to see his face although not as clearly as she would have liked as the lighting in the garden was not that clear. She was however confident that she was able to see his face. She had a further opportunity to look at the face of her attacker when the two of them were in the main bedroom where they had gone to fetch the condom. The light in that room was on and that gave her a chance to have a good look at the face of her assailant.

[8]. Shortly after the attacker left the police arrived on the scene and the complainant gave them a description of the attacker and, in particular, described to the police what he was wearing. On the 20th September 2015 at an official SAPS Identity Parade the complainant identified the appellant as the person who attacked her on the night of the 8th of August 2015.

[9]. At about 21:00 on the same night the appellant was arrested in the Olivedale area by the arresting officer, Constable Phanyane, and his partner. They arrested the appellant close to where the robbery had occurred because he fitted the description given by the complainant to the police of the person who attacked her. When they saw him for the first time they recognised his blue clothes, as fitting the description of that worn by the robber, and they stopped him with a view to establishing whether he was the person who they were looking for. When they searched him they also found a red and silver knife, again fitting the description given by the complainant. He was then arrested.

[10]. On the issue of identity it is necessary to consider the evidence of the complainant as well as the evidence of the arresting officers. The complainant positively identified the appellant at the identity parade as the person who

attacked and robbed her. Although no evidence was led by the State as regards the procedures followed when conducting the identity parade, the evidence of the complainant was to the effect that she fingered the appellant out of a line – up. She also made a 'dock identification'. The complainant remained adamant that the appellant was the person who robbed her on the day in question. When it was put to her that the appellant denies any involvement in the housebreaking and the robbery, her response was simply: 'I am saying that it was him'.

[11]. The Regional Magistrate approached the evidence of the complainant concerning identity with the necessary caution required when dealing with the evidence because of a single witness on the robbery and identity (see *S v Mthethwa*, 1972 (3) SA 766(A) 768 a-b). She correctly held that the evidence of the complainant was clear, satisfactory, sincere, honest and reliable and that sufficient safeguards existed for the acceptance of her evidence (see *S v Charzen and another*, 2006 (2) SACR 143 (SCA) at 147 (I – J). I cannot find any fault with the Regional Magistrate's findings. The safeguards lie therein that the appellant is linked in time and space to the crime in that he, fitting the description of the attacker, was apprehended in close proximity to where the crime was committed. As submitted by Ms Buitendacht, Counsel for the State, it is too much of a coincidence that a balaclava – clad person, wearing a blue 'work suit' and hand gloves, was found at the scene of the crime and shortly thereafter found in the vicinity of the crime. The complainant had sufficient opportunity to make a proper and reliable observation of the appellant.

[12]. The complainant positively identified the appellant at the ID Parade, and there is no evidence or suggestion for that matter that the identification was rigged or that the complainant had been coaxed by the police. Although there was no evidence that the identity parade was held in accordance with sound procedural rules, conversely it cannot be said that the integrity of the identity parade could and should be faulted. The fact of the matter is that the complainant pointed out the appellant at the identity parade.

[13]. The evidence of the arresting officers stands almost uncontested. Importantly, the appellant, when he was arrested, was wearing the clothes described as that worn by the attacker, notably the blue 'work suit', the balaclava and the hand gloves. Even more telling is the fact that the proverbial 'smoking gun', that being the knife, was found in possession of the appellant when he was arrested. These facts inextricably link the appellant to the robbery of the complainant.

[14]. The version of the appellant is one of general denial. He denies that he committed the offences which he was charged with. When the state witnesses were being cross – examined, it was put to them that the appellant would deny that he had robbed the complainant. He in fact denied that he was at the scene of the alleged crimes. Bizarrely, his explanation for the balaclava and the hand gloves was that these items he possessed and used in his job as a scrap metal collector. The balaclava helped, so his version went, with the germs when he pulls it over his face and the gloves help with him getting in contact with hazardous substances.

[15]. It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford,* 1937 AD 370 at 373, 383). In *S v Van der Meyden*, 1999 (2) SA 79 (W), which was adopted and affirmed by the SCA in *S v Van Aswegen,* 2001 (2) SACR 97 (SCA), it was reiterated that in whichever form the test is applied it must be satisfied upon a consideration <u>of all the evidence</u>. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in *Moshephi and Others v R*, LAC (1980 - 1984) 57 at 59F - H, which was cited with approval in *S v Hadebe and Others,* 1998 (1) SACR 422 (SCA) at 426f - h:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees'.

[16]. What is important is the overall picture. If the appellant's denial is to be accepted, it would mean that the complainant, in concert with various members of the South African Police Services, concocted the story against him from beginning to end. The suggestion is made that the complainant was robbed, which is common cause, and then in a manner of speaking drew the names of the appellant from a hat and resolved to have him charged criminally. This is not tenable.

[17]. The appellant's defence was also one of an alibi, which was supported by the evidence of a person who also lived in the veld in Olivedale, who testified that, at the time of the commission of the crime, the appellant was sitting with them at their informal place of residence in the veld in Sharonlea / Olivedale. They were busy preparing food presumably on an open fire. The appellant then, according to the witness, went into the veld to go and collect fire wood, and that was the last time the witness saw the appellant. The witness testified that he was with the appellant up to about 21:00, whereafter the appellant went to collect fire wood and then disappeared. This 'alibi', if it was an alibi, was

rejected by the court *a quo* on the basis that it did not really add value to the case of the appellant. We agree with this approach by the Regional Magistrate.

[18]. I am of the view that the Regional Magistrate, after considering all the probabilities and improbabilities and particularly the fact that there is no onus on the appellant to convince the court of the truth of his explanation, correctly held that the appellant's evidence was inherently improbable and false beyond a reasonable doubt. The Regional Magistrate's finding that sufficient corroboration existed in linking the appellant to the crimes of housebreaking, robbery and sexual assault cannot be faulted. The improbability or implausibility of the version of the appellant, particularly the fact that on his version the complainant and the police invented stories against him, is apparent.

[19]. I am accordingly unable to find any reason for disturbing any of the factual findings made by the court *a quo*. The case against the appellant was overwhelming and he was accordingly correctly convicted.

[20]. It follows that the appeal against the convictions must fail.

Sentence

[21]. As regards the appellant's appeal against his sentence, it is trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection entitling this court to interfere. The crimes in question were of a serious nature, perpetrated by the appellant who invaded the complainant's privacy. I do not consider there to have been any misdirection in the Regional Magistrate's full and careful judgment on sentence, which would entitle this court to interfere with the sentences imposed. It moreover cannot be

said that the sentences are unduly harsh or inappropriate (see *S v Kgosimore,* 1999 (2) SACR 238 (SCA)).

[22]. The appellant received an effective sentence of direct imprisonment for a period thirteen years.

[23]. A convenient starting point is the fact that the provisions of s 51(2) of the CLAA, read with Part II of schedule 2 of the said Act, apply. Section 51(2) provides as follows:

'(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i). a first offender; to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years'.

[24]. 'Robbery, when there are aggravating circumstances', is an offence referred to part II of schedule 2 of the CLAA. This means that a minimum sentence of at least fifteen years is applicable to the sentences imposed on the appellant herein. The aggravating circumstances consist of the use of a knife during the house robbery. That being the case, the question is whether substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The Regional Magistrate found the existence of such

substantial and compelling circumstances and accordingly imposed a sentence less than the minimum sentence for the armed robbery conviction.

[25]. It appears that, at the time of the trial, the first appellant was 35 years of age and a first offender. He was married at the time with three children, aged eleven, seven and two years old. At that time he was 'living the life of a vagrant', meaning that he lived in the veld and was employed informally as a metal scrap recycler. He was not maintaining his wife and children, who, according to the appellant, returned to Zimbabwe, whence the wife comes from originally.

[26]. The factors which the court *a quo* found to be substantial and compelling were in the main the fact that, at age 35 years old, the appellant was still a first offender. Also a knife, as against a firearm, was used to threaten the complainant, who, according to the Regional Court, was not physically harmed. The cumulative effect of the aforegoing the court *a quo* concluded amounted to substantial and compelling circumstances which warranted a deviation from the applicable minimum sentence.

[27]. I take into consideration what was stated by the SCA in *S v Vilakazi*, 2009 (1) SACR 552 (SCA). Nugent JA had this to say at par [58]:

> 'In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the

appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character.'

[28]. It was necessary for the court to find the existence of substantial and compelling circumstances before it was entitled to impose a lesser sentence. In considering whether substantial and compelling circumstances were present, the learned magistrate had regard to the appellants' personal circumstances. I have already alluded to those above. The court also had regard to the severity and the seriousness of the offences committed by the appellant, and in the end that there were in fact substantial and compelling circumstances which warranted a lesser sentence.

[29]. I am satisfied that the learned regional court magistrate properly considered whether there were substantial and compelling circumstances to deviate from the minimum sentences provided for in respect of the offences under the relevant provisions of section 51(2) of the CLAA as read with part II of schedule 2 thereof, and also carefully considered the triad of factors relevant to sentencing, namely the nature of the offence, the personal circumstances of the offenders including their moral blameworthiness and the interests of society by which I include the interests of the victims. I am also satisfied that the Regional Magistrate was justified in not imposing the minimum sentence, and showed the appellant mercy.

[30]. It follows that the appeal against sentence must fail.

Order

Accordingly, I make the following order:-

1. The appellant's appeal against his convictions is dismissed.

2. The appellant's appeal against his sentence is dismissed.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree,

A MILLAR
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	6th September 2018
JUDGMENT DATE:	7th September 2018
FOR THE APPELLANT:	Adv Buthelezi
INSTRUCTED BY:	Legal Aid South Africa
FOR THE RESPONDENT:	Adv T Buitendacht
INSTRUCTED BY:	The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg