01/12/2017

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A790/16

In the matter between:

PHILLIP MASINA Appellant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. OK
1/12/17
DATE
SIGNATURE

and

THE STATE Respondent

JUDGEMENT

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1. This is an appeal on conviction and sentence before the High Court, Pretoria Division on the 13th of November 2017. The matter *a quo* was heard in the Regional Court, Witbank under case number: SH140/2015. Mr Masina (the appellant) faced one count of murder and one count of rape. Section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997, is applicable due to the fact that the victim died during the commission of the rape and due to the infliction of grievous bodily harm.

2. The appellant was legally represented and pleaded not guilty to both charges. He made admissions in terms of Section 115 of the Criminal Procedure Act, Act 55 of 1977. He admitted that the deceased was Nxobile Precious Khoza (the deceased) and that she died as a result of manual strangulation with evidence of sexual assault which happened on 14th March 2011. The appellant also admitted that doctor Magope conducted a post mortem on the body of the deceased on 15th March 2011. The post mortem report was handed in as Exhibit "A".

3. The only fact in dispute was whether the appellant was the person who had raped and/or murdered the deceased.

4. The state called the following witnesses:

   4.1. Mrs Sibongile Masina, the aunt of the deceased and mother of the appellant;
   4.2. Edith Nkosi, her evidence did not take the matter and further;
   4.3. Theresa Vermaak, who took photo's of the appellant and scene;
   4.4. Sibongile Emily Mdau, the neighbour of the first state witness;
   4.5. George Ndlovu, a medical assistant that visited the scene;
   4.6. Mr Molotso, he apparently took swabs during the post mortem. Nothing further came of this forensic evidence.

5. The appellant testified and he called no witnesses.

6. Mrs Masina testified that she heard a noise during the night of the incident. She looked out of the window and could not see anything unusual outside. The noise continued and she went to check in the outside room of the deceased. She found the door open. It was dark inside as there was no light inside. She however saw two people lying on the floor. She initially thought that it was the neighbours' daughter and the deceased because they were friends. She inquired from the deceased why she was sleeping like this but got no answer. Immediately after she asked this the other person crawled underneath the bed. She locked the bedroom door and went to fetch the neighbour.

7. Upon the return with the neighbour and having her cellphone light, she unlocked the door again and she pulled the person from under the bed and saw that it was her son, the appellant. The zipper of his trouser was slightly open. His eyes were open. The appellant did not speak. It was not in dispute that the deceased was dead at that stage. The State handed in photos as Exhibit "B" depicting the house of Mrs Masina and the position in which she found the deceased. The pictures were taken after the blanket was removed which covered the deceased up to her breasts. Photos 3 to 6 are photos of the deceased and there were clear injuries to her and blood was coming out of her ear and nose.

8. Under cross-examination the appellant's version was put to her. She did not deny that the appellant came from Ogies, where he had some alcohol. It was not denied that he returned home and entered the house and watched

television in the dining room. It was put to her by the appellant that he then went to the room of the deceased to investigate the noise and he found the door slightly open and he saw two shadows of people in the room. The appellant further testified that he felt a blow with an iron rod from behind. Mrs Masina could not deny or admit it. It was further put to her that the appellant fell down as a result of the blow and that he did not rape or kill the deceased. The appellant further stated that he was unconscious when she pulled him out from under the bed and he did not speak. Mrs Masina states when she was still in the room, the other person who crawled under the bed, was still conscious.

9. The neighbour Mrs Sibongile Emily Mdau said she entered the room. She testified that she used a torch as a light source in the room, while the first witness used the light on her cellphone. This witness testified that when the appellant was pulled from under the bed, his trouser was on his thighs. This witness confirmed that the eyes of the appellant were open when he was pulled from underneath the bed. The court *a quo* found that the contradictions between these two witnesses were not material.

10. The evidence of Mrs Mdau corroborated that of the mother of the appellant in the following aspects:

10.1. both saw that the eyes of the appellant was open when pulled from underneath the bed;

10.2. the appellant did not respond to the situation he found himself in, nor did he give an explanation for his presence in the room of the deceased.

11. The court *a quo* found that it was clear that the appellant tried to sit on two chairs. Firstly, he put it to Mrs Mdau that when his mother pulled him from under the bed, his trouser went down. Secondly when putting his version to Mrs Mdau, said that he could not answer his mother when pulled from underneath the bed, because he was unconscious. The dilemma he is seized with was, that if he was unconscious he would not have known that his trousers were pulled off, when he was pulled from under the bed.

12. Theresa Vermaak testified about certain photos taken of the appellant. I think the photos really did not take the matter further. When Mrs Mdau testified that the appellant reported to her that nothing was wrong with him and this was never disputed by the appellant.

13. The evidence of Mr Molotso does not take this matter any further because the appellant did not deny the injuries to the deceased. That was the State's case.

14. Thereafter the appellant testified. He testified that he returned home after drinking, the evening in question. Whilst watching television in the dining room he fell asleep and was woken up by a shouting noise inside the house. The first state witness testified that the noise was of bumping or pushing a cupboard. He testified to noticing two shapes in the room of the deceased.

The appellant contradicted himself to which side of the neck he was hit. He said that after he was hit he saw nothing and only became conscious again when there were a lot of people, the police and ambulance. He said when he was hit he fell and could not give a response to his mother's version because he was unconscious. He also cannot remember that he was pulled from underneath the bed.

15. The appellant was shown photos 3 & 4 in Exhibit "C" that show scratches on both sides of his neck. He said he does not remember what scratched him, but he admitted that he had scratch marks. He then tendered evidence that he was involved in a fight at the taxi rank the previous week.

16. The court *a quo* found that the State did not present any direct evidence that the appellant did strangle the deceased or raped her. The evidence by the State was all circumstantial evidence. The State may prove a fact in issue with circumstantial evidence provided that the inference to be drawn is consistent with all the proven fact and no other reasonable inference can be drawn from those facts. The court *a quo* stated that when the first state witness saw two people in the room and one went under the bed she left and locked the door. On her return she unlocked the door and the deceased was still lying on the floor and the other person was pulled from underneath the bed and found to be the appellant. Therefore the only inference that can be drawn from this is that it was the appellant that initially was next to the deceased.

17. Secondly, when the appellant was pulled from underneath the bed his pants was not as they should be. Whether it was a case of his zip being partly open or whether the pants were halfway down does not really matter.

18. Furthermore the eyes of the appellant were open when he was pulled from under the bed and he did not give his mother an explanation of what happened. He did not complain to his mother about any injuries to him, nor about an attack on him.

19. Lastly the fact that he had injuries to both sides of his neck, which are scratch marks, and his explanation for such scratch marks, to be from a fight five days ago with open hands, does not ring true.

20. The court *a quo* found that the only reasonable inference to be drawn from these facts is that the appellant is the one that raped the complainant and strangled her. Court *a quo* found that the appellant's version was not reasonably possibly true because if he was knocked out due to a blow as he entered the room surely, he could not have crawled underneath the bed. There were only two people in the room as his mother entered the first time and locked the door and on her return there was still only two people in the room. Court *a quo* found that the only reasonable inference to be drawn from the facts was that the appellant was the person that attacked the deceased, raped her and strangled her.

21. After sentencing and during the compilation of the report by social services the mother of the appellant informed the probation officer that the appellant has a low intellect and that he previously attempted to rape her and he could not remember he tried to do so. The court *a quo* then made a ruling in terms of Section 78(2) of the Criminal Procedure Act that there be an enquiry and report in terms of Section 78(2). It was found that there was no indication that the appellant is not criminally responsible as a result of any mental illness or defect or any other reason. See Annexure "G" to the record of the court *a quo*.

22. During sentencing the appellant tendered the following factors in mitigation:

22.1. He is 32 (Thirty Two) years old, single and has no children;

22.2. He earned R2,200.00 (Two Thousand Two Hundred Rand) per month;

22.3. He stayed with his girlfriend;

22.4. He passed grade 7;

22.5. He has one previous conviction of theft during 2006.

23. The defence also conceded that there were no substantial and compelling circumstances present to warrant a lesser sentence.

24. The court *a quo* took the following factors into consideration during sentencing:

24.1. The appellant is a first offender;

24.2. The appellant is an adult;

24.3. The appellant has no children and is living with a girlfriend;

24.4. The appellant supported himself;

24.5. The appellant already spent 6(six) months in prison on this matter.

25. The court *a quo* found that there were no compelling and substantial circumstances warranting a lesser sentence and sentenced him to a life sentence on both murder and rape to run concurrently.

26. The appellant was detained from the time that he was convicted.

27. No substantial and compelling circumstances were advanced on behalf of the appellant why the court *a quo* should deviate from a minimum sentence. The court only looked at the possibility that the appellant was under the influence of alcohol at the time of committing these crimes. The Court came to the conclusion that the appellant drinks often and then he causes problems. The court *a quo* found, taking into account all the evidence, that the prescribed minimum sentence is the appropriate sentence. The court also explained to him that he has automatic leave to appeal to the High Court. The court *a quo* also took into account his previous conviction of theft committed on 17th December 2005 on which he paid an admission of guilt fine of R100.00 (One Hundred Rand). There was also a pre-sentence agreement that recommend a custodial sentence.

28. In *casu*, counsel on behalf of the Appellant argued that the State's case relies exclusively on circumstantial evidence. The State witnesses, Mrs Masina and

Mrs Mdau, only arrived on the scene after the commission of the offences and does not rule out the possibility that someone else could have raped and killed the deceased. There was no evidence to confirm that the injuries on the genitals of the deceased were recent. Counsel for the Appellant further argued that the proven facts do not exclusively prove that the appellant penetrated her. It was lastly argued that the State failed to discharge the onus of proving its case beyond reasonable doubt.

29. It was argued by Counsel for the Respondent that it was stated in ***R v Blom 1939 AD 188*** at 202 – 203 that:

> *"(1) The inference sought to be drawn must be consistent with all the proven facts. If it is not, then the inference cannot be drawn;*
>
> *(2) The proved facts should be such that they exclude every reasonable inference from them save the ones sought to be drawn. If they do not exclude other reasonable inferences, than there must be a doubt whether the inference sought to be drawn is correct."*

30. It is clear from the evidence presented by the State that the version put forward by the Appellant is highly unlikely. His version that he was hit with an object on the back of his neck is highly improbable taking into account that he never made mention of this incident to his mother, Mrs Masina nor to the neighbour, Mrs Mdau when they found him in the room with the deceased.

31. The appellant again had an opportunity to inform the medical assistant, Mr Ndlovu about the fact that he was hit with an object at the back of his neck but failed to do so. This is indicative of the fact that his version in terms of the above was a recent fabrication.

32. To take this further it would be impossible for the appellant to move from underneath the blanket and crawl under the bed if his version that he immediately, after the blow to the back of the neck, lost consciousness.

33. The mother of the appellant then locked the door of the room where she found the deceased and another person just to re-open it later in the presence of the neighbour, Mrs Mdau.

34. Both his mother and Mrs Mdau then confirmed that when he was pulled from beneath the bed his eyes were open. Notwithstanding this the appellant failed to make or give any explanation of his presence in the room of the deceased.

35. When the appellant was pulled from underneath the bed his mother testified that he had pants on and his zipper was partly open. Mrs Mdau testified that his pants were partly down to his thighs. It is submitted that this contradiction is not material and rather corroborates the evidence of both witnesses that the pants of the appellant was not as it was supposed to be.

36. The appellant, during his testimony, gave the explanation that his pants slid down when he was pulled from underneath the bed. A startling admission

taking into account that he was unconscious until the time when there were many people on the scene.

37. Photos 3 & 4 of Exhibit C was also shown to the appellant showing clearly fresh scratches on both sides of his neck. His response was that he admitted having these scratch marks but does not remember what scratched him. He then tendered evidence of an altercation he had a week earlier at a taxi rank. He however testified that the said fight took place with open hands which clearly make it highly unlikely that there would be scratch marks.

38. It is clear from the evidence that the Magistrate *a quo* did not misdirect herself in terms of the judgement and that the evidence against the appellant is in fact overwhelming and the State did proof its case beyond reasonable doubt.

39. The sentence is indeed in accordance with Act 51 of the Criminal Amendment Act, 105 of 1997 which prescribe a minimum sentence of life imprisonment on both charges. The only issue is if the court *in casu* should find that there exist substantial and compelling circumstances to deviate from the minimum sentence.

40. In **S v Tafeni 2016 (2) SACR 720 (WCC)** the Court reached a decision that a sentencing court that makes a finding, in terms of Section 51(3) of the Criminal Law Amendment Act 105 of 1997, that it is or is not satisfied that substantial or compelling circumstances exist, does not exercise a judicial discretion in the narrow or strict sense of the word, as does a sentencing court

in determining an appropriate sentence. For that reason the court of appeal has to adjudicate on a trial court's finding that there were no substantial and compelling reasons justifying the imposition of a lesser sentence than the prescribed minimum sentence. The court of appeal may reconsider the finding of the court *a quo* even where the sentence itself was not vitiated by material misdirection. The court of appeal has to decide whether the court whose finding is questioned was wrong to have determined on the facts of the case that there were no substantial or compelling circumstances justifying a departure from the prescribed minimum sentence.

41. The remorse on the part of an appellant may be substantial and compelling and as such justify a departure from the otherwise prescribed minimum sentence. To ascertain if the appellant has shown real remorse, will depend on the circumstances of each case. It is from the surrounding actions of the appellant rather than what he says in court that the true indicators of genuine remorse must be found.

See: **S v Monye & Another 2017 (1) SACR 329 (SCA)**

42. It is clear from the case that the appellant never showed any real remorse. He in fact raped and killed his own cousin and throughout the trial *a quo* denied any involvement in these crimes. The victim lost her own mother when she was still very young and her aunt, Mrs Masina took the appellant into her own house. During this whole trial Mrs Masina, the mother of the appellant, had to testify against her own son. She did so with the integrity that must have been

very painful to her. She just lost her sister's daughter. She now stands to lose her son to a term of life imprisonment.

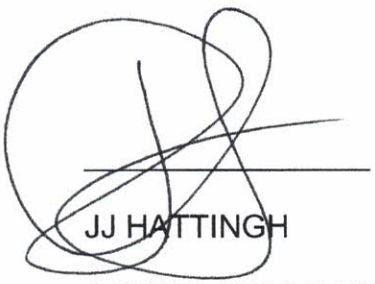
43. The appellant, to the end, denied his involvement in these crimes by simply stating that he does not remember anything about it.

44. It is indeed so that the court of appeal may not and will not interfere with an imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably or where the sentence induces a sense of shock or is startlingly inappropriate. None of these circumstances exist in the present matter.

45. Consequently I find that the appeal against the appellant's conviction in respect of both counts and sentence should be dismissed.

46. In the result the following order is made:

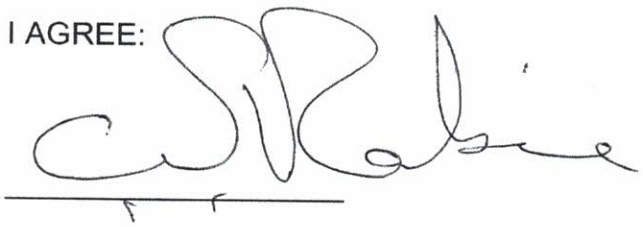
46.1. The appeal is dismissed.



JJ HATTINGH

ACTING JUDGE OF THE HIGH COURT

I AGREE:



CP RABIE

JUDGE OF THE HIGH COURT