IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

11/05/2017

CASE NO: A4/2016

Reportable: No

Of interest to other judges: No

In the matter between:

RAHIM DZIMBIRI Appellant

and

THE STATE Respondent

JUDGMENT

ELLIS, AJ:

(1) The appellant, who was legally represented throughout the trial, was charged in the regional court with housebreaking with the intent to rape (count 1) and rape (count 2). Regarding the charge of rape, the appellant was specifically charged with a contravention of the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of sections 51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 *("Act 105 of*

1997"), in that the complainant was raped more than once.[1]

(2) During the first appearance in the court a *quo*[2] and before entering any plea on the charges, the appellant was fully informed by the court a *quo* that the provisions of section 51 of Act 105 of 1997, applies in respect of the charge of rape and that the appellant, if convicted, may be sentenced to imprisonment for life.[3]

(3) The appellant pleaded not guilty to both counts and entered a bare denial in respect of the charge of housebreaking. Regarding count 2, the appellant stated that he had consensual sexual intercourse with the complainant, only once. He was convicted on 4 August 2015 and sentenced to 5 years' imprisonment on count 1 and life imprisonment on count 2. The court a *quo* ordered the sentences to be served concurrently.

(4) This appeal is against both the conviction and sentence in accordance with the provisions of section 309(1) of the Criminal Procedure Act 51 of 1977.[4]

(5) In *S v Monyane and Others,*[5] the court explained the approach to be adopted by the appeal court faced with an appeal against conviction, as follows:

> "[15] This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (S *v Francis* 1991 (1) SACR 198 (A) at 204e)."[6]

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[1] Annexure A to the charge sheet - paginated page C in the record of proceedings.
[2] Paginated page D in the record of proceedings.
[3] Paginated page D read with page 1 of the record of proceedings
[4] The Appellant has an automatic right to appeal without having to apply for leave to appeal.
[5] 2008 (1) SACR 543 (SCA).
[6] S *v Monyane and Others* 2008 (1) SACR 543 (SCA) at [15].

(6) It is therefore apposite to succinctly refer to the evidence presented during the trial.

(7) The complainant, a female student aged 20 at the time of the incident, testified that on 15 October 2014 she was alone in the shack where she resides, already asleep when she heard someone attempting to force open the door of the shack. She tried to get hold of her landlord on her cellphone, to no avail. Thereafter a short person entered the shack, immediately covered her mouth with his hand and told her that if she shouts he will kill her. She recognised the voice as that of the appellant, whom she had known for 2 years, as he is in a love relationship with her […].

(8) The appellant then tied her hands with a string and raped her without using a condom. The complainant proceeded to testify that the appellant allowed her to relieve herself in a bucket situated in the shack, wherafter he again raped her without using a condom. Appellant then told her to pray because he was going to kill her. She pleaded with appellant not to kill her, wherafter he kept quiet and left the shack.

(9) Soon after appellant had left, complainant reported the incident to her landlord, S Z. Her landlord at first did not believe complainant. However, after complainant showed her the R40 left by appellant as well as the string he used to tie her hands and a note[7] in which he threatened to burn her shack, S Z told her to phone her older sister.

(10) Complainant reported the incident to her sister in person as well as her brother, who summoned the police. During cross-examination complainant denied appellant's version of events, more particularly that she had consensual intercourse with appellant.

(11) Dr M Makiangi, who examined the complainant after the incident, testified that her injuries are not consistent with normal consensual sexual intercourse. Dr Makiangi's evidence was not contested by appellant.

[7] Exhibit "B" to the record of proceedings.

(12) The evidence of Z B, complainant's landlord in essence corroborated complainant's report of the incident and the money (R40), string and note left by appellant.

(13) T N, complainant's […] in short testified that appellant is her boyfriend and that they live together. They also have two children. On 15 October 2014, appellant closed the tuck shop which he runs and told her that he was going somewhere, without disclosing his whereabouts. He did not return home that night but phoned her about 07h00 the following morning. However, at that stage complainant had already informed her that she had been raped by appellant. During one of appellant's appearances in court, the appellant told her that he had been having a love affair with complainant.

(14) According to appellant's testimony, the complainant was his girlfriend and they had an intimate relationship which they kept secret. On 15 October 2014, complainant called him to come over because she needed money for food. At around 20h00 that night she opened the door for him and invited him to stay over. They then had consensual sexual intercourse thrice and in appellant's own words "...*the third time is when I ejaculated, your worship. The initial stages were just warm ups."* Before he left the next morning, appellant gave her R40 for transport to his residence. Appellant also admitted that he wrote the note[8], but contended that it was meant for a customer and not the complainant. Appellant left the note in complainant's shack because she discouraged him from giving it to the said customer.

(15) It is trite that the assessment of evidence ought to be informed by adopting the following approach:

> "Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to."[9]

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[8] Ibid.
[9] S *v Stevens* [2005] 1 All SA 1 (SCA) at [1].

(16) Accordingly and in *S v Jackson,*[10] the court held the following in respect of the cautionary rule in sexual assault cases, namely:

> "The cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."[11]

(17) In this regard, a court should refrain from adopting an approach which separates the evidence before court into compartments by examining the defence case in isolation from the State's case and vice versa,[12] but rather ensure that the conclusion which is reached (whether it be to convict or to acquit) accounts for all the evidence.[13]

(18) It is quite apparent that the court a *quo* indeed treated the evidence of the complainant with caution and refrained from adopting a compartmentalised approach in that all the evidence was viewed holistically, weighing all the contradictions, probabilities and improbabilities.

(19) To this end, the complainant as a witness impressed the court a *quo* as a credible witness and the record reflects no reason to question this impression. Her evidence was found to be satisfactory on all material aspects and corroborated by her reports to her landlord, her sister and the medical practitioner who examined her afterwards. The only criticism raised by the court a *quo* was that it appears from the record that complainant testified that she was raped twice, whilst the medical practitioner noted that she informed him that she was raped three times. Incidentally, the medical practitioner's note accords with the evidence presented by the appellant, namely that he and the complainant had sexual intercourse on three occasions during the night in question.

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[10] 1998 (1) SACR 470 (SCA).
[11] S *v Jackson* 1998 (1) SACR 470 (SCA) at 476*e-f*.
[12] S *v Stevens* supra at [18].

(20) On the other hand, the appellant did not impress the court a *quo* as a witness and his version of events was held to be wholly improbable and inconsistent with human nature. In this regard, the court a *quo* criticised the evidence of appellant in several respects, more particularly on the following:

(a) That appellant's evidence in chief contradicts his evidence during cross-examination on the ostensible relationship between him and complainant, prior to the incident;

(b) That it is highly improbable that complainant would have phoned appellant, requesting money for food if she just returned from her brother, who was supposed to give her money two days later;

(c) It was specifically put to complainant that the note accidentally fell out of appellant's pocket, whilst appellant in his testimony came with an elaborated version of the note being part of a four page document, which he drafted but purposely left at complainant's dwelling; that it was not meant for her, but for a customer who owed him money for pots;

(d) That on the degree of probabilities, the contents of the note indicate that it was left for complainant;

(e) That it is highly unlikely that complainant would falsely accuse appellant of rape, whilst knowing full well that she, her sister and children would lose the much needed financial support of the appellant in the process.

(21) In view of the aforesaid, I am unable to find any misdirection in the factual findings made by the court a *quo* and consequently agree that appellant's quilt had been established beyond reasonable doubt. Appellant was therefore correctly convicted.

(22) It is a trite principle of our Criminal Law that sentencing discretion lies pre-

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[13] S *v Van der Meyden* 1999 (1) SACR 447 (W) at 449*c*-450*b*.

eminently with the sentencing court and ought to be exercised judicially and in line with established principles governing sentencing.[14] Accordingly, an appeal court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence had been vitiated by material misdirection or is disturbingly inappropriate.[15]

(23) In exercising its discretion, the court must consider the established triad enunciated in S *v Zinn,*[16] consisting of the following:

(a) The nature, magnitude and effect of the crime itself;

(b) The interests of society; and

(c) The interests of and circumstances surrounding the offender.

(24) It is furthermore accepted that a court of appeal should be guided by the aforesaid principle that punishment is pre-eminently a matter for the discretion of the trial court and should be careful not to erode that discretion.[17] A sentence should therefore only be altered if the discretion has not been judicially and properly exercised. The test is whether the sentence is vitiated by irregularity, misdirection or is so disturbingly inappropriate that it induces a sense of shock.[18]

(25) During sentence of the appellant, the court a *quo* considered all the relevant factors pertaining to sentencing, including the personal circumstances of the appellant. The court a *quo* also took note of the fact that appellant is not a first offender. On 14 August 2014, appellant was sentenced to 18 months' imprisonment for a conviction of robbery.[19]

(26) In considering whether substantial and compelling circumstances exists in respect of the minimum sentence to be imposed on the rape conviction, the court a *quo* took the following into account, namely:

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[14] S v PB 2013 (2) SACR 533 (SCA) at [19].
[15] S *v Kekana* 2013 (1) SCAR 101 (SCA) at [11].
[16] 1969 (2) SA 537 (AD) at 540G.
[17] S *v Rabie* 1975 (4) SA 855 (A).
[18] S *v Motloung* 2016 (2) SACR 243 (SCA) at [7]-[8].

(a) That appellant knew the complainant and abused his position of trust by raping her more than once;

(b) That appellant knew that complainant was vulnerable and living alone in a shack;

(c) That appellant thought that he could silence the complainant with the money which he left in her shack after the incident;

(d) That appellant threatened to kill the complainant which was repeated in the note that he left behind;

(e) That appellant did not use a condom, thereby exposing the complainant and her sister to sexually transmitted diseases or the fear of contracting same.

(27) In conclusion, the court a *quo* found that there were no substantial and compelling circumstances present that warrant a deviation from the prescribed minimum sentence of life imprisonment on the rape conviction.

(28) Taking into consideration all relevant factors pertaining to sentence, I find no reason or basis to interfere with the sentence imposed by the court a *quo.*

ORDER:

1. In the result I make the following order:

1.1 The appeal against the conviction and sentence is hereby dismissed.

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[19] Pages 100-101 of the record of proceedings.

I. ELLIS
ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED:

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L M MOLOPA-SETHOSA J
JUDGE OF THE HIGH COURT

APPEARANCE ON BEHALF OF APPELLANT: S Moeng obo Pretoria Justice Centre

APPEARANCE ON BEHALF OF RESPONDENT: Adv G.J.C. Maritz

Date of hearing: 13 March 2017