IN THE GAUTENG HIGH COURT

(LOCAL DIVISION JOHANNESBURG)

Case No: A323/2013

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

18 February 2014 **EJ FRANCIS**

In the matter between:

NKAYI, BANDILE — Appellant

and

THE STATE — Respondent

JUDGMENT

FRANCIS J

1. On 26 June 2011 the appellant was charged in the Protea regional court with the following charges: firstly kidnapping; secondly attempted murder and thirdly rape in contravention of section 3 read with the relevant provisions of Act 32 of 2007 further read with section 51 and 5 and schedule 2 of Act 105 of 1997. He pleaded guilty to all three charges and was duly convicted. On 19 August 2011 he was sentenced to four years imprisonment for kidnapping, five years imprisonment for the attempted murder and life imprisonment for the rape charge. All the sentences were ordered to run concurrently.

2. The appellant was granted leave to appeal against sentence only.

3. The facts relevant to sentence are briefly the following: the appellant said that on 2 December 2010 he and the complainant had received a lift from IDT Security Officers. They both alighted from their motor vehicle at Lenasia. He followed the complainant as they were walking home and walked fast until he caught up with her. He then walked with her until they reached an open veldt and he decided to pull her to the nearby bushes. Although she resisted he overpowered her and managed to drag her into the bushes. She did not agree to go into the bushes and he took her by force. Once they were in the bushes he ordered her to undress her clothes and she seemed to do so but with resistance. When they heard people's voices who were passing the complainant screamed for help and ran away. He then gave chase after her armed with a broken bottle in his hand. He was then able to catch up with her and stabbed her on her back more than once to make her stop running. When she started bleeding she stopped running and he was again able to get her to go back to the bushes. At the bushes he undressed her and himself and ordered her to lie on her back facing up. Whilst he was on the ground he penetrated his erect penis into her vagina and had sexual intercourse with her without her permission. He then got off her after he had ejaculated and left her there. He admitted that he had no right to act in such a manner and that the way he had stabbed her with the broken glass he could have killed her. He knew that his conduct was both wrongful and unlawful and therefore punishable by law. He knew that he had no legal defence against the charge that he was facing.

4. The appellant who was legally represented was correctly convicted for the charges that he pleaded guilty to. He had had admitted all the elements of the charges that he was faced with.

5. As for the sentence the regional magistrate said that the appellant was 25 years old at the time, was unmarried with two children who were six and three years respectively. At the time of his arrest he was not formally employed but was doing carwash at Lenasia and used to have an income of R300.00. He used this money to support his two children. He would sometimes fit car radios as well as alarms. He would have loved to pursue his studies but went up to grade 11 and dropped out of school. He had a problem with alcohol and drank on a daily basis. He also has a problem with sexual desires in that each time he looked at a magazine where he would see a naked woman or on TV, he would be aroused but he was fortunate that in most cases the girls always liked him. He used to have many girlfriends before he was arrested. He also has a problem with the people that he associated with. He had pleaded guilty to the charges. The court said that if took into account the decision in *S v Nkomo* 2007(2) SACR 198 (SCA) referred to him by his counsel. The court said that it took into account that there were also chances that he may be rehabilitated and should not be condemned to life imprisonment. The court said that it also took into account that he has committed a very serious offence which was accompanied by violence. He referred to *S v Dyantyi* 2011 (1) SACR 540, *S v Malgas* 2001 (1) SACR 469 (SCA) and *S v Chapman* 1997 (2) SACR 3 (SCA). The court said that the appellant has a similar previous conviction for

rape. It took into account that he has children that he is supporting and because if he is incarcerated for the rest of his life his children would suffer economic hardship, and it would affect his ability to play soccer or maybe for as a trade for his country. The court took into account the time that he spent in custody and the fact that he was intoxicated at the time of the incident but that it could not serve as a compelling and substantial factor that it may only serve as a mitigating factor like the fact that he pleaded guilty.

6. The court said that on the other hand it is generally known that the effects of sexual assault, such as a rape are very much considerable because there is a fear by the victim of harm experienced during the rape, accompanied by the realisation that the victim may contract veneral disease or a deadly disease which is HIV and since he did not use a condom there is a fear that a woman can get pregnant as a result of the rape and the complainant will suffer some trauma of deciding to terminate the pregnancy or bear the child. The court found that the complainant had been brutally attacked by the appellant. He has used a broken bottle to stab her. She was seriously injured and he almost killed her. He stabbed her whilst she was running away from him twice in the back. He had displayed cruelty at the highest order.

7. The appellant was sentenced to life imprisonment for rape. He was a second offender and had been sentenced on 26 December 2007 to two years imprisonment of which one year was suspended of 3 years imprisonment on condition that he was not convicted during that period of suspension.

8. Sentencing is inherently within the discretion of a trial court. This court's powers to interfere with the trial's court's discretion in imposing sentence are limited unless the trial court's discretion was exercised wrongly. The essential enquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the court exercised its discretion properly and judicially. If the discretion was exercised wrongly, this court will interfere with the sentence imposed. There must be either a material misdirection by the trial court or a gross disparity between the sentence which the appeal court would have imposed had it been the trial court. This Court can interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate. In this regard see *S v Salzwedel and others* 1999 (2) SACR 586 at 588 A – B. The rape charge falls within the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997. The minimum prescribed sentence for such an offence is life imprisonment unless the court found substantial and compelling circumstances. It is trite that when a court considers an appropriate sentence the seriousness of the offence, the interest of the accused, as well as the interest of the society ought to be taken into account.

9. The question that arises here for determination is whether the court a quo misdirected itself in imposing life imprisonment for the rape that the appellant was sentenced for. On appeal it was contended that the court *a quo* placed over-emphasis on the seriousness of the offence and the interest of the community, which resulted in the sentence that was harsh and inappropriate.

Mercy is also an element that ought to have been considered when sentencing the appellant and the sentence imposed does not show mercy to the appellant.

10. The appellant was legally represented in the court a quo. The provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 was brought to his attention. This provides that rape as contemplated in section of the Criminal Law (Sexual Offences and Related matters Amendment Act, 2007 involving the infliction of grievous bodily harm the sentence to be imposed is life imprisonment if the rape falls within Part II of Schedule 2. If it falls under Part III of Schedule 2, in the case of a first offender to imprisonment of not less than 10 years imprisonment , 15 years for a second offender and 20 years for a third or subsequent offender. The appellant had pleaded guilty to the rape charge which falls under section 51 and Part II of Schedule 2 of the Criminal Law Amendment Act. Should the court be satisfied that there are substantial and compelling circumstances that exist which justify the imposition of a lesser sentence than the prescribed sentence it shall enter those circumstances on the record of the proceedings and thereupon impose such lesser sentence.

11. The rape of a child or any person for that matter cannot be condoned. The act of rape is in itself a vicious act that utterly destroys the victim. It is a brutal act as such. The medical report was handed in as evidence which confirmed that the injuries are consistent with rape.

12. The court *a quo* found that there were no compelling and substantial circumstances that warrants the imposition of another sentence other than life imprisonment. A victim impact report was handed in. It reveals that the complainant was 23 years old and is the mother of two children aged 5 and 3 years respectively. After she and the appellant had alighted from a vehicle driven by security official she attempted to cross the street but was prevent from doing so by the appellant who pulled her back with her hair and instructed her not to scream. She felt unsafe as they were in a quiet area. He ordered her to take off her clothes but she attempted to run away. He stabbed her three times with a bottle, twice in her back and once in her face. Whilst she was bleeding she was forced to lie down and he raped her without using any condom. After he had raped her he tied her hands and legs with shoe laces and used her t-shirt to tie he mouth. After he had left she untied herself she ran to the main road and was rescued by the police. He was arrested later that night. She had greatly been affected both physically and emotionally by the rape incident that occurred. The traumatic incident also affected other individuals who are well close to her like her partner. She is in the process of recovery but is still finding it very difficult to cope but she is a strong person with great strength considering that she is making efforts to functional. The support she receives from her family during that period of need is very helpful. More counselling sessions are still necessary for her to heal. Her family has played a very supportive role in her time of need, confusion and frustration.

13. In *S v Malgas* 2001(1) SACR 469 (SCA) sentencing courts were enjoined not

to have regard to individual court's views with regard to the efficacy of minimum sentences. The full court stated that firstly the sentencing court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. The sentencing court is required to approach the question of sentencing conscious of the fact that the legislature has ordained certain mandatory minimum sentences. Secondly the legislature has now aimed at ensuring a severe, standardised and consistent response from the courts to the commission of such crimes unless there were and could be seen to be truly convincing reasons for a different purpose. Thirdly the emphasis has now shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. Fourthly this does not mean that all other considerations are to be ignored. There are a possibility of 'substantial and compelling circumstances' as was stated at page 477 in *S v Malgas* the central thrust of the focus on substantial and compelling circumstances' is that sentences 'are not to be departed from lightly or for flimsy reasons', but a court must take into account the ultimate cumulative impact of all circumstances as previously have been taken into account. As was pointed out that 'while each of a number of mitigating factors when viewed in isolation may have little persuasive force their combined impact may be considerable'.

14. The only issue that arises in this matter is whether substantial and compelling circumstances have been shown to exist in this matter that warrants a different sentence to life imprisonment. It was argued by the defence that there are substantial and compelling circumstances namely that the appellant was 25

years old at the time of sentence; he pleaded guilty and took responsibility for his actions, he has 2 minor children which he supports, he is the breadwinner in his family, he was not permanently employed but earned R300 per week, his highest level of education is grade 11, he abused alcohol and was intoxicated at the time of the incident, he did not have a father as a role model – his father disappeared during his early development stage, he showed remorse for his actions and he acknowledged the fact that he has a drug and sexual problem and is not beyond rehabilitation.

15. The question of what constitutes substantial and compelling circumstances was dealt with by the Supreme Court of Appeal in *Patrick Clive Bailey v The State* delivered on 1 October 2012 under case number 454/2011 at paragraphs 21 to 24 as follows:

"The most difficult question to answer is always: what are substantial and compelling circumstances? The term is so elastic that it can accommodate even the ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part of the sentencing court. I have, however found the following definition in S v Malgas (above) para 22 to be both illuminating and helpful.

'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.'

16. The following was said in *S v PB* 2011 (1) SACR 448 SCA at paragraph 10:

"In S v Matyityi, approximately nine years after Malgas, this Court noted that

criminality is still on the rise in our country despite the imposition of the minimum sentences, and has again stressed the relevance of the legislation as follows (para 23):

'Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is 'no longer business as usual".'

17. In *S v Matyityi* 2011 (1) SACR 40 (SCA) at page 53 C – G the SCA reiterated that:

"the crime pandemic that engulfs our country has not abated. The Courts are duty bound to implement the sentences prescribed in terms of this Act and that all defined concepts such as relative youthfulness or other equal vague and ill founded hypotheses that appears to fit the particular sentencing officer's personal notion of fairness ought to be eschewed."

18. In *S v Vilikazi* 2009 (1) SACR 552 (SCA) Nugent JA put it as follows:

"I should not be understood to mean that the absence of any one or more of the various aggravating features specified in the Act necessarily justifies the departure from their prescribed sentence, for what or that would suggest that the maximum sentence is reserved for only extreme cases. That was not so prior to the Act and is not the case now. There comes a stage at which the maximum sentence is appropriate to an offence and the fact that the same sentence will be affected by an even greater horror means only that the law can offer nothing more. Whether and if so to what extend the absence of other aggravating circumstances might diminish the offender's culpability will naturally depend upon the particular circumstance of the case."

19. The following was stated by the SCA in a judgment delivered on 26 November 2012 in the matter of *Kwanape v State* under case number 422/12 at paragraphs 23 and 24:

"I S v M the Constittutional Court made plain that whilst the sentencing court must ensure that the form of punishment imposed is the one that is least damaging to the interest of children given the legitimate range of choices in the circumstances available to the sentencing court. This obligation does not avail parents who invokes it as a pretext for escaping the otherwise just consequences of their misconduct. In the context of this case the court below

did not enjoy any legitimate range of choices in regard to the sentence given that the prescribed period of imprisonment for life was a sentence ordinarily to be imposed. Moreover the little information apparent from the records suggests that the incarceration of the appellant could not have left his minor children destitute. Whilst persisting in his argument in this regard counsel for the appellant nevertheless accepted that long term imprisonment is called for on the facts of this case. In dealing with a similar argument in Vilikazi this court said that 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 the period should be and those seem to me to be the kind of flimsy grounds that Malgas said should be avoided."

20. I have already pointed out that the court *a quo* considered the various mitigating factors that exists in this case. It is not necessary to repeat it. The court correctly found that the rape of a women and children cannot be condoned. The court referred to the J88 that was handed in. A perusal of the J88 reveals insofar as it relates to the rape that she sustained a superficial laceration in her vagina and bruises which was consistent with forceful vagina penetration.

21. This court has a great sense of unease about the imposition of life sentence for this particular rape and has a greater anxiety that the court *a quo* perpetrated an injustice when it imposed life imprisonment. I have reached the point that where the unease has hastened into a conviction that an injustice has been done, that can only be because I am satisfied that the circumstances of this particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. In my view there are substantial and compelling circumstances to justify the imposition of a lesser sentence. The factors placed before the court

a quo were sufficient to prevent the court to impose life imprisonment. The appellant had pleaded guilty and did not waste the court's time. He was intoxicated at the time of the incident. He seems to be unable to control his sexual desires. In imposing the sentence of life imprisonment the court *a quo* misdirected itself.

22. An appropriate sentence in the present case would be twenty years imprisonment.

23. This brings me to the question whether the sentence imposed for the kidnapping and attempted murder charge should run concurrently with the sentence imposed on the rape sentence. It is trite that a court must consider the cumulative effect of a sentence and reduce the total of period of imprisonment so that it is proportionate to the total moral blameworthiness of the perpetrator. In *S v Motswathupa* 2012 (1) SACR 259 (SCA) at paragraph 8 at page 263, it was held that a court must not lose sight of the fact that the aggregate penalty must not be unduly severe, when dealing with multiple offences. It is trite that sentencing courts in all the divisions of our courts have been enjoined to have regard to the nature of the offences and where there is a close connection or similarity between the offences involved or where there is a close connection in time and place and in intention with regard to the offences involved, then usually the counts are taken as one for purpose of sentence or the sentences are ordered to run concurrently. In the present case there is such an overlap. Firstly there is a conjoining as to time and place of the offences. The

kidnapping, attempted murder and rape flowed out of one incident.

24. In the result the appeal against sentence is upheld to the extent that the sentence imposed by the court a quo is set aside and substituted with the following.

24.1 'The accused is sentenced as follows:

24.2 On count 1, 4 years imprisonment.

24.3 On count 2, 5 years imprisonment.

24.4 On count 3, 20 years imprisonment.

24.5 The sentence imposed on count 1 and 2 are to run concurrently with the sentenced imposed on count 3.

24.6 The effective sentence is 20 years imprisonment.

24.7 The accused is deemed ~~to~~ unfit to possess a firearm.

24.8 The sentence is backdated to 19 August 2011."

FRANCIS J
JUDGE OF THE HIGH COURT

I agree

JULY AJ
JUDGE OF THE HIGH COURT

FOR APPELLANT	:	E A GUARNERI
FOR RESPONDENT	:	ADV M RAMPYAPEDI
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