REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A141/2019
DPP REF NO: 10/2/5/1-2019/117

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

[20 FEBRUARY 2020] ..... SIGNATURE

In the matter between:

MUDAU, FRANS **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MUDAU, J:

[1] The appellant was convicted by the Protea regional court of three counts of rape, kidnapping and robbery with aggravating circumstances, read with the provisions of section 51 (1) and (2) of the Criminal Law Amendment Act[1] (counts 1-5). The appellant was acquitted of assault with intent to do grievous bodily harm (count 6).The state had alleged and the trial magistrate subsequently found, that the complainant in respect of counts 3 and 4 was

[1] 105 of 1997.

raped more than once. The appellant was sentenced to life imprisonment, all the charges having been taken together for purposes of sentence. The appellant is aggrieved with the sentence. The appeal is targeted against sentence only. The appellant has an automatic right of appeal in terms of section 309 of Act 51 of 1977[2] read with sections 10 and 43(2) of Act 42 of 2013.[3]

[2] The relevant facts underlying the convictions are as follows. On 12 February 2010 at 04h00 in the morning the complainant in counts 2, 3, 4 and 5 was on her way to work on foot. A Nissan bakkie approached her. The driver was the appellant and only occupant. The appellant offered her a lift to the station, which she rejected. The appellant then took out a pistol, which he pointed at her and ordered her to get into the motor vehicle. He threatened to shoot her if she made attempts to flee.

[3] Once inside the bakkie he pointed the firearm towards her stomach and instructed her to keep her head down after which he drove off. After driving for a while, the appellant stopped and alighted from the vehicle. He relieved himself after which he came to the side of the vehicle where the complainant was seated and ordered her to take off her panty. She was wearing a skirt at the time. After taking off her panty the appellant raped her by inserting his penis into her vagina without the use of a condom as she laid on the seat of the bakkie.

[4] Once done, the appellant drove off until he reached another area where he stopped and again instructed her to take off her panty. This time, he ordered her to alight from the vehicle and to lie down on the ground where he once again raped her by inserting his penis into her vagina without the use of a condom. Once done, he instructed the complainant to lie on her stomach facing down after which he drove away. In the process he took her handbag which contained her bank card, identity document, cosmetics and purse with aboutR150-00 to R200-00 in cash. The complainant was thereafter assisted by an unknown woman and her mother who is a police officer. She was taken to the police station and thereafter to Baragwaneth Hospital for examination. The medical report reflected that the hymen had some swelling and fresh

[2] Criminal Procedure Act ('CPA').
[3] Judicial Matters Amendment Act.

irregular bruising. The vaginal examination revealed semen like discharge consistent with vaginal penetration. The appellant was also linked to the incident by DNA evidence.

[5] The complainant in count 1 knew the appellant beforehand. They had met at a "buy and braai" occasion not far from her place of residence. The appellant was with a group of friends . On that occasion, they exchanged phone numbers. On 10 August 2010, during the evening, the appellant called her wanting to establish where she was. It was about 21h30. She was with a friend of hers in another township. The appellant offered to give her a lift from where she was as she wanted to go home. She gave him directions after which he arrived in the Nissan 1400 bakkie. At the appellant's request, they drove to a tavern in Meadowlands where they drank and danced for a couple of hours after which she asked him to drive her home.

[6] On the drive the appellant touched her thighs. Despite her objections, he continued doing so and punched her twice on her face. She tried to exit the bakkie but the door was locked. The appellant took a beer bottle and hit her with it on her face. Instead of driving her home, he drove to an open veld where he took off her panty after overcoming her. He thereafter raped her by inserting his penis inside her vagina without the use of a condom. The incident of rape occurred on the driver's seat. The appellant was connected to this incident by DNA evidence as well. The complainant had a swollen forehead and blunt trauma on her right eye.

[7] In pre-sentencing proceedings the state proved records of previous convictions against the appellant. On 27 March 1995 the appellant was convicted of robbery and subsequently sentenced to five years imprisonment of which one year thereof was suspended for five years on customary conditions. On 17 March 1999 the appellant was convicted of robbery with aggravating circumstances for which 15 years imprisonment was imposed. He was also declared unfit to possess a firearm. At the time of his sentencing for the matter under consideration the appellant was 40 years of age, married by customary law and a father to two minor children, aged five and three years respectively. The children are in the care and custody of their mother. His

highest level of education is grade 11. He worked for a taxi association and issued stickers for taxi routes.

[8] It is trite that sentencing rests pre-eminently in the discretion of the trial court and an appeal court cannot, in the absence of a material misdirection by the trial court, interfere with the sentence only because it is not one that the court itself would have imposed.[4] To do so is tantamount to usurping the trial court's discretion which will have the effect of eroding the discretion entrusted to the trial court.[5] It is further trite that an appeal court may, in certain circumstances be justified in interfering with the sentence imposed by the trial court when the disparity between the sentence of the trial court and that which the appellate court would have imposed is so marked that it can properly be described as shockingly, startlingly or disturbingly inappropriate.

[9] The only issue in this appeal is whether the effective life sentence imposed on the appellant for all the offences can justifiably be set aside; regard being had to all the relevant factors as enunciated in *Zinn*.[6] The seriousness of the crimes cannot be understated. The appellant was convicted of very serious offences. It is a matter of serious concern that the appellant committed the crimes in counts 2-5 whilst on the run, having skipped bail in relation to the rape in count. As Mahomed CJ stated in *S v Chapman*[7] which is often cited in most rape matters notes, rape is a serious offence constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the individual[8]. In this matter both victims were sexually molested by the appellant without the use of a condom. The victims were thus exposed to a number of sexually related illnesses, such as HIV.

[10] In a country such as ours, where the HIV rate is one of the highest in the entire world, there is no doubt that the complainants would have been traumatized as they cried throughout their evidence before the trial court and were deeply anxious as a result of these incidents. These were horrific crimes. The appellant preyed on defenceless women. The specific circumstances

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[4] *S v Malgas* 2001 (2) SA 1222 (SCA) at para 12.
[5] *S v Rabie* 1975 (4) SA 855 (A); see also *Malgas* at para 12.
[6] *S v Zinn* 1969 (2) SA 537 (A).
[7] 1997(2) SACR 3 (SCA).
[8] Also cited in *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19)[2019] ZACC 48(11 December 2019).

under which both incidents occurred illuminate the fact that women are not safe in this country. It further illustrates that their rights to freedom of movement and liberties as enshrined in the Bill of Rights are hollow and not protected by certain segments of our communities.

[11] The appellant was legally represented throughout the trial. In spite of the overwhelming evidence against him in the form of DNA evidence, he pleaded not guilty which by law he was entitled to do. During sentencing, he was sorry for what he termed 'a mistake' regarding both incidents. In mitigation of sentence and of his own volition under oath, he testified that he was yet facing another unspecified offence. Our law presumes he is innocent until his guilt has been established[9]. Although the trial court did not deal with this aspect, I have no doubt that the appellant was merely feeling sorry for himself.

[12] The appellant deserved a second life term of imprisonment as the victim in respect of count 1 sustained grievous bodily injuries during the course of the incident[10].The magistrate in acquitting the appellant of aggravated assault concluded that the assault was aimed at achieving his ultimate aim ,which was the rape of his victim. It follows accordingly that there is no misdirection committed by the trial court which I can find. To his credit, counsel for the appellant was I argument before us constrained to concede as much. Neither does the sentence induce any shock. The appellant is predisposed to violence as evidenced by his criminal records and the incidents of these crimes. He is a danger to society. Society will be best served if he is permanently removed from it. There is, accordingly, no merit in the appeal.

[13] The appeal against the sentence of life imprisonment is dismissed.

T P MUDAU

[Judge of the High Court,

Gauteng Local Division,

Johannesburg]

[9] Section 35 (3) (h) of the Constitution of the Republic of South Africa, Act 108 of 1996.

[10] Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, rape involving the infliction of grievous bodily harm attracts a sentence of life imprisonment.

I agree.

N MANOIM
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

APPEARANCES

For the Appellant:	Adv. L Musekwa
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For the Respondent:	Adv. M Van Heerden
Instructed by:	DPP JHB
	011 220 4048
Date of Hearing:	17 February 2020
Date of Judgment:	20 February 2020