REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT

PRETORIA

(REPUBLIC OF SOUTH AFRICA) 11/4/14

Case no: A694/2013

In the matter between:

NDUKU SIMON NKOSI APPELLANT

AND

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

01/04/2014 .....

THE STATE RESPONDENT

JUDGMENT

BAQWA J, KHUMALO J

[1] This is an appeal against sentence only subsequent to a conviction and sentence of the appellant by the Magistrate in the Regional Division of Gauteng sitting at Nigel.

[2] The appellant was charged with two counts of kidnapping and committing an act of sexual penetration with a minor child without her consent as defined in section 3 of the Criminal Law Amendment Act 32 of 2007 (rape) and he pleaded not guilty to both counts.

[3] He was convicted on both counts and sentenced to six (6) years on count one (kidnapping) and to twenty three (23) years on the second count of rape. He applied for leave to appeal against sentence only and leave was granted accordingly.

[4] The background to this case is briefly as follows;

4.1. Complainant, who was ten (10) years old at the time of commission of the offence, disappeared after having been sent to buy some meat at a nearby shop by her mother. She was found by her aunt the following day at the premises of the appellant.

4.2. The J88 report completed by the witness Doctor Themba Khambule corroborated complaint's evidence with regard to the injuries suffered and the treatment she suffered at the hands of the appellant.

[5] After testing complainant's competence as a witness and weighing her evidence and that of the other state witnesses against that of the appellant, the magistrate found that the state had proved its case beyond a reasonable doubt and convicted the appellant.

[6] It is correct that the charge sheets attached to the case record refer to different accused and case numbers. However, the contents thereof refer to the complainant in this case, date of offences and charges pertaining to the subject matter of this case. The rest of the record seems to indicate a typographical error in the said charge sheets.

[7] It is also correct that the Magistrate concluded that there were substantial and compelling circumstances present which enabled the court **a quo** to deviate from the sentence of life imprisonment prescribed in the Criminal Law Amendment Act 105 of 1997 (commonly referred to as the Minimum Sentences Act).

[8] The court **a quo** found the following to be mitigating factors:

Appellant is a first offender who is not married, unemployed and without dependants. He spent 38 months in prison pending the outcome of the trial. The magistrate also considered in appellant's favour that complainant, who was twelve (12) years old when she testified did not appear to show any residual adverse effects whilst testifying in court.

[9] Despite the Magistrate's deviation from the sentence prescribed in the Minimum Sentences Act, counsel for the appellant submits that twenty three years (23) for the count of rape is shockingly harsh and inappropriate in the circumstances. At the same time counsel correctly concedes that the rape,

particularly of young children, is considered in a very serious light and that it should be visited with appropriately stringent sentences.

[10] The fact is, whilst guidance must inevitably be sought by the sentencing court from other similar cases, it is not a purely mathematical or mechanical process. Each case should be judged on its own merits.

[11] Appellant was forty three (43) years old at the time of the commission of this offence without having had a brush with the law. This is a factor that ought to have weight heavily in the appellant's favour.

[12] A further factor that ought to have been weighed in favour of the appellant by the court **a quo** is that both the kidnapping occurred at the same time and place. The court therefore ought to have considered the sentences running concurrently.

[13] On the other hand, the deliberate manner in which the appellant acted, in kidnapping a young child who was at the time ten (10) years old, tying her up and raping her overnight was in itself a cold-blooded and chilling act committed by a person who was old enough to be a parent of the child, the appellant. I find this to be an aggravating feature in this case which would not justify a reduction of sentence.

[14] It is trite that sentence should fit the triad of the crime, the criminal and the needs of society. It is in this context that I agree with the sentiments expressed in the case of **S v Sikhipa 2006(2) SALR 439 SCA** where the following was stated:

"In my view, life imprisonment is not a just sentence for the appellant. However, a lengthy sentence of imprisonment is warranted. I consider that a period of twenty (20) years imprisonment will send a message to the community that rape, and especially the rape of a young girl, will be visited with severe punishment. It will send a strong deterrent message."

[15] In the circumstances I propose that the sentence imposed by the court **a quo** be set aside and substituted with the following:

15.1. The appellant is sentenced to serve a term of six (6) years imprisonment on count 1.

15.2. The appellant is sentenced to serve a term of twenty three (23) years imprisonment on count 2.

15.3. The sentence on count 1 will run concurrently with the sentence on count 2.

15.4. The particulars of the appellant should be registered in the National Register of Sexual Offenders and appellant is prohibited from being licensed to possess a firearm.

It is so ordered.

S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

I agree.

N.V KHUMALO

(JUDGE OF THE HIGH COURT)