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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: A 195/2016
14/12/2016
Reportable: No
Of interest to other judges: No
Revised.

In the matter between:

Essau Bheki Khumalo — Appellant

And

The State — Respondent

JUDGMENT

Maumela J.

1. With leave of the trial court, this matter came before court as an appeal against both conviction and sentence. Before the regional court for the district of Mpumalanga, held at Secunda, (the court a *quo*), appellant, Essau Bheki Khumalo, who was legally represented throughout the trial, was charged with multiple counts.

2. He pleaded not guilty when the charges were put. The state led evidence. Appellant testified in defence. He did not call any witnesses. In most of the offences, the appellant

was linked as the perpetrator through DNA evidence. In counts where appellant was not linked through DNA evidence, the court relied on the evidence led. In that regard, identity parades were conducted on the 25th of February 2011 and 1st of March 2011 respectively. A number of witnesses testified for the state. On his side appellant testified and did not call witness.

3. At the close of trial, the court a *quo* rejected the version of the defence and upheld that of the state on the following:

2.1. Sixteen counts of kidnapping.

2.2. One count of attempted rape.

2.3. Three counts of rape, (common law), read with the provisions of section 51 of the Criminal Law Amendment Act 1997.

2.4. Seventeen counts of rape as contemplated in section 3 of the Sexual Offences and Related Matters Act 2007.

2.5. Five counts of Robbery with Aggravating circumstances as intended in section 1 of the Criminal Procedure Act 1977.

2.6. One count of robbery, (common).

2.7. One count of murder read with section 51 (1) of the Criminal Law Amendment Act.

4. Appellant was sentenced as follows:

3.1. For each of the sixteen counts of kidnapping he was sentenced to undergo ten years of imprisonment.

3.2. Ten years imprisonment for attempted rape.

3.3. Life imprisonment in respect of each of the three counts of rape, (common law), read with the provisions of section 51 of the Criminal Law Amendment Act 1997.

3.4. Life imprisonment in respect of each of the seventeen counts of rape, as contemplated in section 3 of the Sexual Offences and Related Matters Act 2007: (Act No 32 of 2007); read with the provisions of section 51 (2) of the Criminal Law Amendment Act 1997.

3.5. Fifteen years imprisonment in respect of each of the five counts of Robbery with Aggravating circumstances as intended in section 1 of the Criminal

Procedure Act 1977.

3.6. Ten years imprisonment in respect of one count of robbery, (common).

3.7. Life imprisonment in respect of one count of murder read with section 51 (1) of the Criminal Law Amendment Act.

CONVICTION.

5. All in all, the state called no less than 28 witnesses. Appellant testified in defence without calling witnesses. In respect of counts 18 to 20 and 34 to 38, no DNA link was established. The complainant in these counts did not partake in the identity parade. It was contended on behalf of the appellant that the state in these counts relied singularly on what is referred to as dock identification. It is contended that this identification was incorrect.

6. Appellant makes the point that the complainant in counts 23 to 24, J. R. was a single witness. He contends that she was frightened and traumatised, much as her attackers were unknown to her. He also raises the point that there is no feature through which complainant identified him. Whereas the incident is alleged to have happened on the 13th of August 2009, complainant only saw the appellant on the 13th of August 2013, at which occasion she did the contested dock identification.

7. Appellant argues that this complainant is not even aware of the number of occasions at which each of the perpetrators raped her. Appellant argues that it is therefore only on the basis of assumption that the complainant claims to have been raped by more than one person. He argues that it could still have been only one person who raped the complainant.

8. In testifying, the complainant indicated that she had ample time to view the appellant as he attacked her. She looked at him so as to be able to remember him in future. Besides, the appellant's semen was found within complaint's body earlier than the timing at which he claims to have had consensual sex with her. His story about it is fraught with contradictions, so much so that the court a *quo* was correct in not upholding his version.

9. Concerning counts 32 to 34 the appellant was linked through DNA evidence.

However he claims to have been in a love relationship with the complainant, Nurse Bettie Maphangela. He contends that sex with the deceased was consensual. He argues that the state did not successfully rebut his contention. He charges that the state did not prove the case against him beyond a reasonable doubt.

10. It is trite that appellate courts have to be loath to interfere with findings by trial courts. In S v Hadebe and others[1], the court stated that: *"It was well to recall yet again the well-established principles governing the hearing of appeals against findings of fact, which were, in short, that in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong."*

11. In S v Ntsele[2] the court held that: *"the onus which rested upon the State in* a *criminal case was to prove the guilt of the accused beyond reasonable doubt - not beyond all shadow of* a *doubt. Our law did not require that* a *Court had to act only upon absolute certainly, but merely upon justifiable and reasonable convictions - nothing more and nothing less."*

12. Concerning conviction there is no demonstrable and material misdirection committed by the court a *quo* which could be a basis for interference with its findings. The court finds that the court was correct in finding that the state proved its case against the appellant beyond a reasonable doubt in the counts on which the latter was convicted. Consequently the appeal against conviction stands to be dismissed.

ON SENTENCE.

13. The appellant contends that the sentence imposed on him induces a sense of shock. He charges that the court a *quo* erred in not finding substantial and compelling circumstances to be attendant to his person which could justify the court in avoiding the imposition of the prescribed minimum sentence.

14. The appellant was 35 years old when he was sentenced. It is contended on his behalf that he was middle aged and he could still be rehabilitated. He was unmarried

[1] 1997 (2) SACR 641 (SCA), at page 642.

but was cohabiting. He has two minor children aged 8 and 5 respectively. He passed grade 7. He grew up in a broken family. He lost his parents at the age of 5 and was brought up by foster parents. He was employed and was earning R 1 800-00 per month. He was a first offender.

15. The court a *quo* had to consider whether or not substantial and compelling circumstances are attendant to the person of the appellant which can justify the court in avoiding the imposition of the prescribed minimum sentence. Appellant contends that the court a *quo* erred in not finding that substantial and compelling circumstances are attendant to his person.

16. In S v Roslee[3], the supreme court of appeal in considering a contention by the defence to the effect that substantial and compelling circumstances obtain in an accused expressed the following principle at *545 E: "Although there is no onus on the accused to prove the presence of substantial and compelling circumstances, it is so that an accused who intends to persuade* a *court to impose* a *sentence Jess than that prescribed should pertinently raise such circumstances for consideration."*

17. The personal circumstances of the appellant can hardly be described as substantial and compelling. Were the court a *quo* to have found differently; such a finding would have been based on flimsy reasons as defined within the reasoning expressed in the case of S v Malgas[4].

18. In that case the court stated the following: *"When applying the provisions of section 51,* a *trial court is not in trial mode. It is not confronted by* a *prior exercise of judicial discretion attuned to the particular circumstances of the case and which is* ***prima facie*** *to be respected. Instead it is faced with* a *generalized statutory injunction to impose* a *particular sentence, which injunction rests, not upon all the circumstances of the case, including the personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2. Concomitantly, there is* a *provision which vests the sentencing court with the power, indeed the*

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[2] 1998 (2) SACR 178 (SCA), at page 180 D - F.
[3] 2006 (1) SACR 537 (SCA).
[4] 2001 (1) SACR 469, at page 479.

obligation to consider whether the particular circumstances of the case require a *different sentence to be imposed. And* a *different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist, which justify it."*

19. On sentence again appellant charges that the court a *quo* erred in failing to order concurrency to be applicable to the sentences imposed. However there is consensus between the parties about the provisions of section 280 (2) of the Criminal Procedure Act 1977: (Act No 51 of 1977). This section addresses; "cumulative or concurrent sentences and provides in subsections 2 as follows:

> *"(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.* "

20. It is a well-established fact that where life imprisonment is imposed together with one or more custodial sentences, then the life sentence runs concurrently with the other sentences. As a result the sentences imposed upon the appellant in this case shall run concurrently with the other sentences imposed. It was therefore not necessary for the court *a quo* to order concurrency onto the sentences imposed. His appeal against sentence therefore stands to be dismissed.

21. In the result, the appeal against conviction and sentence stands to be dismissed and the following order is made:

ORDER.
The appeal against conviction and sentence is dismissed.

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T.A MAUMELA
JUDGE OF THE HIGH COURT
NORTH GAUTENG H GH COURT

I agree

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A.C SASSON

JUDGE OF THE HIGH COURT

NORTH GAUTENG H GH COURT