IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

4 November 2016
DATE

SIGNATURE

CASE NO: A 752/2015

SIPHO LAWRENCE MTHOMBENI Appellant

and

THE STATE Respondent

JUDGMENT

MBONGWE, AJ:

[1] This appeal in terms of Section 309 C of the Criminal Procedure Act 51 of 1977 came before this court consequent to a successful petition by the appellant against the decision of the trial Regional Court Magistrate, Lydenburg, refusing him leave to appeal against his convictions and sentences. The appellant had been convicted on three counts of rape, in contravention of the provisions of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, for which he was sentenced to terms of imprisonment of fifteen years per count. The trial court

had not warned the appellant of the applicability of the provisions of the Criminal Law Amendment Act 105 of 1997 ("the Act"); had found that substantial and compelling circumstances exist which justified a deviation from the imposition of the prescribed minimum sentence of life imprisonment. In effect, the appellant was sentenced to a total of forty five (45) years imprisonment. The appellant was legally represented throughout his trial. He had pleaded not guilty to all three counts. He admitted to having had sexual intercourse once with the complainant on the day of the incident and further stated that the complainant was his girlfriend and had consented to sexual intercourse.

[2] A court hearing an appeal against a conviction will not interfere lightly with the trial court evaluation of evidence, the factual and credibility findings, unless it is convinced that the trial court had misdirected itself and that its evaluation was wrong [***See Rex v* DHLUMAYO and Another 1948(2) SA 677 (A) at 705 -706**]. With this principle in mind I now consider the evidence of the witnesses.

EVIDENCE OF THE COMPLAINANT

[3] The complainant met the appellant for the first time in the week preceding her sexual molestation by him when she had accompanied a friend to appellant's home for a loan from the appellant. She was asked by the appellant whether she was also seeking a loan. She responded by stating that she did not need a loan at the time, but would need it the following week. The complainant was about to leave her home the following week to go to the appellant for a loan when her friend, Sinah, who was the second State witness, came to visit her. She then requested Sinah to accompany her without disclosing where they were going nor the purpose of going there.

[4] When they arrived at the appellant's house the appellant was absent. The complainant phoned the appellant on his cellular phone telling him that she

was at his house and inquiring where he was. The complainant had obtained appellant's numbers from Sinah when she first met the appellant. The appellant was at a nearby tavern, and he arrived within a few minutes, opened the door and invited the complainant and Sinah in and sat in his dining room with them. Sinah was ordered by the appellant to leave the room and wait outside as she had not herself come to ask for a loan. She complied with the order.

[5] The complainant and the appellant were discussing a form which the former was required to complete to get the loan when the appellant received a call. His cellular phone was lying on the floor and plugged to a charger when he answered. After a short conversation the appellant had remained on the floor and was quiet, leading to the complainant standing up to find out what was happening. She found that the appellant had fallen asleep and decided to leave the house. She advised Sinah, who was outside of what had transpired and suggested they leave. No sooner had they reached the corner of the street than the appellant emerged and asked the complainant to return. Sinah told the complainant that she was not going back, but would rather wait for the complainant at the corner.

[6] Back in the house, the complainant and the appellant were still going through the form to be completed when the appellant declared his love for the complainant. She informed the appellant that she did not love him. When he insisted, she told him that she will never love him. The appellant was irked by her response, and told the complainant that she was arrogant and that he was going to rid her of that arrogance. The appellant assaulted the complainant with an open hand and cut her on her face with a knife. He instilled further fear in the complainant by telling her that he is an ex-convict who was not scared of the police and would take her intestines out and throw her body on the street. The complainant was subdued and, to avoid further torture, she asked the appellant what he wanted. The appellant told her he wanted to sleep with her. He then pushed her to his bedroom where he raped her thrice,

taking smoke breaks after each rape incident. The complainant had attempted to get dressed after each rape, but was told by the appellant that "*we are not done yet*". The appellant did not use a condom initially, but wore one before the second rape.

[7] It was during the rapes that the complainant, with a view to securing her release, decided to tell the appellant that she loved him. The appellant suggested that she spent the night with him. She told him she had to go and prepare dinner for her grandmother. It was agreed that she would return after serving dinner and seeing her grandmother to bed. The appellant walked her up to the gate of her home. It was already dark as they walked with the appellant repeatedly telling the complainant how much he loved her and how good he was going to treat her. "*All along he did not realise that I was crying*", she testified. The complainant reported her ordeal to the police very late that night and the appellant was arrested the next morning.

EVIDENCE OF SINAH AND DR RIBA

[8] Sinah corroborated the complainant's evidence with regards to her and the complainant's visitation to the appellant's house, the purpose of their visit which she gathered on her own, from the discussions between the complainant and the appellant, that the appellant had ordered her out of his house when she advised him that she was not looking for a loan and, that she and the complainant had already left the appellant's house when the appellant asked the complainant to return. She further testified that she had waited for the complainant at the corner for more than an hour before deciding to go home without the complainant.

[9] Dr Riba was the doctor who examined the complainant the morning after she had been raped. In my view, there were two aspects of his evidence that were relevant and corroborated the evidence of the complainant and that of the appellant: although he did not record it in the J88, he recalled noticing that the complainant had an injury on her face beside one eye and that her other eye

was red. This confirmed the injuries the complainant stated she had sustained when assaulted by the appellant. His evidence that he had found a piece of a condom inside the complainant's genitalia was indirectly confirmed by the appellant who testified that he had later discovered that the condom he had been wearing was torn in front.

ASSESSMENT OF THE EVIDENCE OF STATE WITNESSES

[10] I could find no material, if any, contradictions in the evidence of the State witnesses nor did their evidence suggest an inclination of bias against the appellant. Instead, there was corroboration on crucial aspects such as the purpose of the complainant's going to the appellant's house. The doctor's evidence regarding a piece of condom he found in the complainant's genitalia was indirectly corroborated by that of the appellant himself regarding his discovery that the condom he had on had broken. The issue whether it was a full or a piece of a condom that was found was not material, but sadly sought to be relied on by the appellant to discredit the otherwise unshaken evidence of his commission of the offences. As will appear hereunder, the evidence of the appellant was, in my view, an adaptation to the complainant's evidence of his fabricated facts meant to exonerate him from his unlawful actions.

APPELLANT'S VERSION

[11] The appellant's version was that he had consensual sexual intercourse with the complainant whom he alleged was his girlfriend. He denied that he assaulted her prior to raping her. He also denied that he had ordered Sinah to leave his house after she had told him she had not come for a loan. It is apparent from the record of the proceedings in the court *a quo* that the appellant had avoided responding directly to questions put to him by either the prosecutor or the trial magistrate preferring to give long responses that were not answering the questions. While denying that he instilled fear to the complainant by telling her that he was an ex-convict, but could not give a direct response to the question how the complainant could have known that he is an ex-convict. He speculated that she may have known by virtue of her

living in the same community. His denial of the complainant's evidence that it was already dark when he finally released and walked her home is at odds with his evidence that the complainant had told him that while they were in a love relationship, they could not go openly together as she had a jealous boyfriend. The appellant's evidence that the complainant sustained an injury to her face due to them falling from the bed and that she bled, even if it were to be believed, suggests that it would have been unlikely that the sex would have continued had there been a genuine love relationship between the two. His evidence of continuation with sexual intercourse points to his insensitivity and lack of care that is inconsistent with a normal love relationship

[12] I can find no misdirection in the trial magistrate's assessment of the evidence and her factual findings in this case. I, agree with her judgment and reasons therefor. The appellant's version cannot be reasonably possibly true and ought to be rejected as false. Consequently, I propose that the convictions of the appellant on all three counts of rape be upheld.

SENTENCES

[13] It is a time honoured principle of our law that the sentence to be imposed on a convicted accused is discretionary to the trial court and that a court hearing an appeal should refrain from interfering with the exercise of such discretion, unless it is clear that the trial court, in imposing the sentence, misdirected itself or failed to exercise its discretion in a judicial manner or the sentence is so inappropriate that it induces a sense of shock. [***See S v Rabie*** 1975(4) SA 855 (A)]. In the present case the trial court erred, in the first instance, by its failure to inform the accused that in the event of him being convicted, the provisions of section 51 (1) (a) of the Act will be applicable. Similarly, the trial court erred having found the existence of substantial and compelling circumstances in respect of the appellant's personal circumstances, it nevertheless imposed an extremely long term of imprisonment totalling 45 years. The sentencing of the accused to a total effective imprisonment term

of forty five years can hardly be a display of a proper exercise of a judicial discretion. On the contrary, it is a manifestation of a misdirection which, led to the imposition of a sentence that induces a sense of shock, thus necessitating intervention by this court.

[14] In my view, and in light of the seriousness and the prevalence of the offences the appellant was convicted of and the fact that he showed no remorse for his actions, an appropriate sentence would be one of a direct imprisonment term of twenty years, five years of which suspended for five years on the condition set out in the order hereunder.

[15] I therefore propose that the following order be made:

1. *The appeal in respect of the convictions is dismissed.*

2. *The appeal in respect of the sentences is upheld.*

3. *The sentences imposed by the trial magistrate are set aside and replaced with the following: The accused is sentenced to direct imprisonment for a period of twenty (20) years, five years of which is suspended for five years on condition that the accused is not found guilty of a similar offence during the period of suspension.*

4. *The sentence is ante-dated to the date of sentence being 5 February 2015 in terms of section 282 of the Criminal Procedure Act 51 of 1977.*

5. *The accused is declared unfit to possess a firearm.*

M MBONGWE
ACTING JUDGE OF THE HIGH COURT

D S MOLEFE
JUDGE OF THE HIGH COURT

I AGREE. AND IT IS SO ORDERED.