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**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**REPUBLIC OF SOUTH AFRICA**

Case Number: A231/2015

DATE: 22 JANUARY 2016

In the matter between:

JOHANNES TEBOGO MAKHALIMA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGEMENT

SEMENYA AJ

1. The appellant was convicted and sentenced by a regional magistrate on two counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, one of housebreaking with intent to steal and theft and two of robbery with aggravating circumstances (robbery) as intended in section 1 of the Criminal Procedure Act 51 of 1977 (CPA). He was sentenced to imprisonment for life in respect of the two rape charges, fifteen (15) years in respect of one of the robbery charges, twenty (20) years imprisonment in respect of the other charge of robbery and eight (8) years for housebreaking with intent to steal. This appeal came before us by way of automatic appeal in view of the imprisonment for life sentence imposed on the appellant in respect of the rape charges.
2. Having convicted the appellant pursuant to his plea of guilty, the regional magistrate proceeded to consider what it deemed to be appropriate sentences in the circumstances of the case. It appears from the record of the proceedings that the regional magistrate was assisted, in this regard, by the pre - sentence reports which were admitted as evidence.
3. As far as the appellant is concerned, the regional magistrate took into account the fact that he was a 33 year old person who was raised by his mother as his parents divorced when he was seven years old. He went to school up to grade 5. He is a father of a ten year old child whose mother is deceased. He was, as at the time of his arrest, unemployed. He failed to inform his family about the reasons for his arrest.
4. The state proved ten previous convictions against him, two of which are for robbery whilst one was for rape. The first offence was committed in 1996 and the last in 2010. It appears from the pre-sentence report compiled in respect of the appellant and his own evidence, that as at the date of sentence, he was serving a prison term of 24 years for housebreaking with intent to rape and rape.
5. The first and second charges in the instant matter were committed against [J.....] [S.....], a 36 year old female person whilst third, fourth and fifth counts were committed against one [A.....] [Z.....], aged 24 years. The two victims were residing within the same area as the appellant.
6. The regional magistrate took the following factors into account in respect of the victim in count one and two. She was of petit build in comparison with the appellant. She was accosted by the appellant and another male person (who is deceased) upon her arrival at her house. The appellant and his companion throttled her and took turns in raping her.

They thereafter took her into the house and robbed her of her property. She and her son are still traumatised by this event. They are however undergoing counselling. She sustained injuries on her throat due to the throttling.

7. The evidence presented in respect of [Z.....] was that she was sleeping at home when she woke up to find a man on top of her. The man hit and throttled her and demanded money. He proceeded to rape her. He thereafter instructed her to run a bath and get into it. He left with her property. The doctor who examined her after the incident noted that she sustained severe injuries on her genitals. She, like the other victim, is still traumatised by the event. She was also petit in built.
8. The above factors, as well as the serious nature of the offences appellant has been convicted of and the interest of the community were the factors taken into consideration by the regional magistrate during sentencing stage.
9. The approach to be adopted by the appeal court faced with an appeal against sentence has been enunciated as follows in S v Pillay 1977 (4) SA 531 (A) at 533 E- G: *“The essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all, or exercised it improperly or unreasonably.”*
10. Counsel for the state did not, correctly and honourably so in my view, present any argument to try and persuade the appeal court to find that the regional magistrate exercised his/her discretion improperly. In any event, she would have had to come up with argument from out of this world to succeed.
11. In as far as count 1, the evidence proved that the victim was raped by more than one person who acted in the execution or furtherance of a common purpose or conspiracy. The regional magistrate was correct in imposing a sentence of life imprisonment.-section 51 (1) read with Part I (a) (ii )-Rape of Schedule II of Criminal Law Amendment Act 105 of 1997 (the Act).
12. On count 2, the evidence proved that the appellant was armed when he robbed the victim. The sentence of fifteen (15) years imprisonment was appropriate in the circumstances-section 51 (2) read with Part II (a) of the Act.
13. As far as count three is concerned, the evidence proved that the victim sustained

grievous bodily injuries during the rape. Imprisonment for life was a competent sentence in the circumstances.-Section 51 (2) read with Part I (c) - Rape.

14. The appellant was already convicted of robbery but not yet sentenced when the regional magistrate sentenced him in respect of count 5. A sentence of twenty (20) years imprisonment was, in accordance with section 51 (2) read with Part (ii) of the Act, appropriately imposed.

15. The regional magistrate stated that he/she is unable to find circumstances which are substantial and compelling to justify imposition of a sentence in deviation from the provisions of the Act as envisaged in section 51 (3) (a). I cannot find any fault in this reasoning. There is no misdirection on the part of the regional magistrate at all.

I propose the following order:

The appeal against sentence is dismissed.

**M.V SEMENYA**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA (ACTING)**

**GAUTENG DIVISION, PRETORIA**

**I agree,**

**N JANSE VAN NIEUWENHUIZEN J JUDGE OF THE HIGH COURT OF SOUTH**

**AFRICA GAUTENG DIVISION, PRETORIA**

**It is so ordered.**

**APPEARANCE ON BEHALF OF THE APPELLANT: Advocate Majola**

**APPEARANCE ON BEHALF OF THE RESPONDENT: Advocate Roos**

**Date of hearing: 23 November 2015**