REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A790/2015

15/6/2016

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

SIGNATURE

15:06:2016
DATE

In the matter between:

SEKAMETTE JOHN Appellant

and

THE STATE Respondent

JUDGMENT

AC BASSON, J

[1] The appellant in this matter was convicted in the Benoni Regional Court on a count of rape. He was sentenced to 10 years'imprisonment. The applicant was granted leave to appeal against conviction and sentence.

[2] The complainant, a 24 year old woman, testified that when she found out that she was pregnant she informed her sister about the pregnancy. Her sister obtained a number of a "doctor" who could assist the complainant in terminating her pregnancy.

[3] The complainant met with the doctor. He gave her four pills and she paid him an amount of R 250.00 for his services.

[4] When the pills did not have the desired effect she phoned the doctor. He informed her to meet him the following day at the Daveyton Mall. She met with the doctor at the Daveyton Mall. After she had spoken to the doctor he met with a second gentleman (referred to by the complainant as "the second doctor") and had a discussion with him. The complainant identified the second "doctor" as the appellant. The complainant thereafter left in the company of the appellant and went to a "surgery". The complainant described the "surgery" as a "shack". The complainant testified that the appellant told her that he was going to give her three pills and that she had to put them in her mouth. He then told her that she had to insert the fourth pill into her vigina. During a conversation with the appellant he asked the complainant whether she had a boyfriend. She told him that she did not inform her boyfriend of her intention to terminate the pregnancy.

[5] The applicant then told her to lie on her back. She told him that she could not insert the pill into her vagina. The appellant then said to her that he will insert the pill into her vagina but that she had to close her eyes. The appellant then proceeded inserting his finger together with the pill into her vagina. She then felt him on top of her and felt him inserting his penis into her vagina. She opened her eyes and tried to push him away. The appellant told her to keep quiet when she tried to push him away. She was then told to put her clothes on and leave. When

she got home she informed her sister of the incident. Her sister called the first doctor who told her that this was not how they operated. The complainant and her sister then went to the police to report the incident.

[6] The complainant was adamant that it was the applicant who raped her and that she did not give her consent. The complainant's sister also confirmed that when the complainant returned from the "doctor" she told her that she was raped.

[7] It is common cause that the appellant was arrested by Constable Masago a few months after the incident. Constable Masago and the complainant first went to look for the appellant at the shack that was used as a surgery and where the complainant was raped. He found that the shack was burnt down by the community. The complainant then informed him that the appellant usually distributed pamphlets in the vicinity of the Daveyton Mall around the taxi rank. Constable Masago went there and found two males distributing the pamphlets. The complainant confirmed in her evidence that they were distributing the very same pamphlets that she had seen before. The complainant called the number and was told by the person who answered the phone that they have relocated. It was not disputed by the appellant that he was the one who had answered the phone. According to the appellant he merely answered the phone on behalf of Dr Subu.

[8] Constable Masago, together with other police officers, thereafter proceeded to the address. Constable Masago pretended to be the brother of the complainant. The appellant told them what his fees was and that he would give them tablets and a mixture. Warrant Officer Bowe accompanied the complainant into a room. There they encountered two gentlemen: The appellant and a one Godfrey. The complainant positively identified the appellant as the person who raped her whereafter the appellant was arrested.

[9] The appellant's version was that he has never met the complainant. He, however, admitted that it was his job to distribute the pamphlets. He also admitted that he

had the doctor's phone with him but explained that he merely answered the phone to give directions to the doctor's surgery.

[10] The learned magistrate summarised the evidence and considered whether the State has proven its case beyond a reasonable doubt. The learned magistrate was also fully alive to the fact that the complainant was a single witness.

[11] In respect of the identity of the appellant, I am in agreement with the findings of the learned magistrate that the complainant had ample time to look at the appellant: She was with him during broad daylight and she had spent some time with him before and after he had raped her. As set out hereinabove, the complainant accompanied the appellant to the shack. When they were in the shack she also had a discussion with him. All of this occurred during broad daylight. On the day of the arrest, the complainant also had no difficulty in identifying the appellant as the one who had raped her.

[12] On behalf of the appellant it was submitted that the presiding magistrate ought to have rejected the complainant's identification of the appellant as the one who had raped her. There is no merit in this submission. Firstly, the presiding magistrate was alive to the fact that the complainant was a single witness and that her evidence had to be approached with due caution. Secondly, the presiding magistrate took into account that the complainant was in the presence of the appellant for some time before he raped her and that this interaction with the appellant took place during broad light. Thirdly, the presiding magistrate also duly took into account the fact that the complainant had no hesitation to identify the appellant on the day he was arrested. Moreover, when the appellant was arrested he was in possession of the very cell phone that she phone him. It was also not in dispute that he had answered the cell phone.

[13] I am in agreement with the finding of the learned magistrate that the state has proved its case beyond a reasonable doubt.

Ad sentence

[14] It is trite that a court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection, or where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed, had it been the trial court, is so marked that it can properly be described as disturbingly inappropriate". See *S v Sadler*:[1]

> "[10].. [I]mportant to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been an appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate Court which must prevail.'

See also S v C*wele & another*:[2]

> [33] It is in my view unnecessary to consider the question whether the trial court misdirected itself when it considered the existence or otherwise of substantial and compelling circumstances. This is because I consider the disparity between the sentence imposed by the trial court and that which this court would have imposed, had it been the trial court, to be so marked that it can properly be described as disturbingly inappropriate.'

[15] I am not persuaded that the sentence imposed by the magistrate suffer any such defects and must accordingly stand. More in particular, it cannot be overlooked that the appellant took advantage of a young woman in a desperate situation. The complainant was extremely vulnerable at the time and wanted to terminate her

---

[1] 2000 (1) SACR 331 (SCA).
[2] 2013 (1) SACR 478 (SCA).

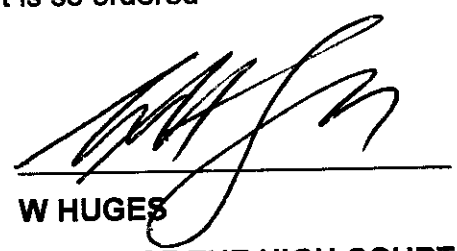
pregnancy. She was taken advantage of by the appellant who pretended to be a doctor and raped her. Although the appellant did not use violence it does not, in my view, detract from the seriousness of the crime. I am in agreement with the conclusion reached by the learned magistrate that there are no compelling and substantial circumstances present requiring a court to deviate from the minimum sentence applicable.

[16] The order I propose is the following:

The appeal against conviction and sentence is dismissed.

AC BASSON
JUDGE OF THE HIGH COURT

I agree and it is so ordered



W HUGES
JUDGE OF THE HIGH COURT

Appearances:

For the appellant	:	Adv. ML Mohlahlo
Instructed by	:	Legal Aid South Africa
For the respondent	:	Adv. MJ Nethonhonda
Instructed by	:	The State Attorney