Original

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A467/15

Date: 24/3/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

22/3/2016 .....
DATE

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In the matter between:

TEBOGO SYDNEY MAKOENA **APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] The appellant was convicted of two counts of rape and one of abduction of a minor in the Regional Court held in Klerksdorp on 28

May 2009. He was sentenced to 30 years imprisonment in respect of each count of rape and 15 years imprisonment in respect of abduction. Leave to appeal was granted on petition against sentence only.

[2] The complainant was 15 years old at the time of the incidents. She was confronted by the appellant when she was walking with a friend. Her friend entered her parents' house and left the complainant with the appellant. Appellant told her he wanted her to be his girlfriend. When she refused he threatened her with a panga. He proceeded to take her to a deserted building where he raped her. After this he took her to a house where he raped her a second time. The complainant pretended that she had to use the toilet outside and managed to run away. She said that the appellant appeared to be slightly under the influence of alcohol. She sustained no serious injuries as a result of the rapes.

[3] The appellant who initially was represented, but who terminated the services of his representative didn't testify. The magistrate at the beginning of the trial warned the accused that he was facing a sentence of life imprisonment and that if convicted the matter would be referred to the High Court for sentencing.

[4] The accused wasn't represented at the time of the sentencing. A presiding officer is obliged to assist an undefended accused[1] in the presentation of his case. Although the magistrate did not assist the

[1] S v Siebert 1998(1) SACR 554

accused in putting mitigating circumstances before the Court. His personal circumstances were however obtained and considered. These were that the appellant was 26 years old, had 2 children with two girlfriends. He did not have permanent employment but earned ± R1 200-00 per month from informal work opportunities. He maintained himself and his three children from this income. Despite the failure by the magistrate to properly assist him his personal circumstances were recorded and I am of the view that the appellant suffered no prejudice as a result of the magistrate's failure[2].

[5] The fact that the magistrate was at the start of the trial obliged to refer the matter to the High Court for sentencing needs some consideration. At the start of the trial during April 2006 the Regional Court did not have jurisdiction to impose a sentence of life imprisonment. However the Criminal Law (Sentencing) Amendment Act 38 of 2007 (the Act) came into operation on 31 December 2007 and in terms of section 1 of the Act the Regional Court was conferred with the jurisdiction to impose a sentence of life imprisonment. The result of that is that on the day of sentencing, which occurred during May 2009, the Magistrate did have the required jurisdiction to proceed with sentencing, and the transitional provision contained in sec 53 A of the Act made provision for the Regional Court to dispose of the matter.

[2] S v Mokela 212(1) SACR 431 (SCA)

[6] The appellant had 2 previous convictions of assault with intent to do grievous bodily harm and in 1998 and 2005 he was found guilty of 2 counts of rape on both occasions.

[7] It is trite that sentencing falls ultimately within the discretion of the court a quo and a Court of appeal should only interfere if there was an irregularity, misdirection or if the sentence is disturbingly inappropriate[3].

[8] The rape of a minor carries the sentence of life imprisonment unless compelling and substantial circumstances exist which would allow for a deviation from this sentence. Although the learned magistrate found that no such circumstances existed he did not impose a sentence of life imprisonment but proceeded to impose 30 years on each of the counts of rape and 15 years for the abduction, an effective terms of 75 years. None of the sentences were ordered to run concurrently. If he imposed a life sentence on each of the rape charges they would automatically have run concurrently[4]. The effect of this is that the sentence imposed by the learned magistrate is actually worse than life imprisonment. The magistrate also did not consider at all that the abduction formed part of the same incident and that the two rapes, although distinct and separate formed part of the same cause of action.

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[3] S v Rabie 1975 (4) SA 855 (A) p 857 D-E; S v Pillay 1997(4) SA 531 A p 535 E-G; S v Kibido 1998(2) SACR (SCA) at p 216 G-H

[4]

[9] There is no doubt that rape is a horrendous crime and that women in our society are particularly vulnerable[5]. The rape of a minor is even more reprehensible[6]. There exists no doubt in my mind that a person who commits rape should be punished effectively not only to show the distaste of society for such horrible acts but also to act as deterrence. It is trite that a presiding officer should balance all the interests, being that of society, the victim and the accused to get to a just result. Due to the fact that the magistrate imposed an effective term of 75 years and did not let any of the sentences run concurrently I am of the view that he misdirected himself which would allow for this Court to interfere. I take into consideration that the complainant did not sustain any serious injuries but due to the fact that the accused had 4 previous convictions of which 2 are for rape I am of the view that he poses a real threat to society and there exist no reasonable prospect for rehabilitation. Consequently there exists no compelling and substantial circumstances which would allow for a deviation from the prescribed sentence of life imprisonment.

[10] In the light of the aforesaid I am of the view that intervention by this Court is justified and the appeal should consequently be upheld. I am of the view that the accused should be sentenced to life imprisonment on the two rape counts and 5 years on the abduction, but all these sentences should run concurrently.

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[5] S v Mosetha 2014 JDR 1282 (GP) at p 10; S v Chapman 1997(2) SACR 3
[6] DPP, North Gauteng v Thabethe 2011(2) SACR 567 (SCA) 577 G-J

[11] I propose the following order:

11.1 The appeal against sentence is upheld;

11.2 The sentence is set aside and replaced by the following:

"The accused is sentenced to life imprisonment on each of the two counts of rape and 5 years on the abduction charge. All the sentences to run concurrently; and

11.3 The sentence is *ante* dated to 28 May 2009.

R G TOLMAY
JUDGE OF THE HIGH COURT

I AGREE:

M S SIKHWARI
ACTING JUDGE OF THE HIGH COURT