REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.:A905/2014

Reportable: Yes

Of interest to other judges: Yes

Revised: Yes

20/6/2016

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS:
GAUTENG, PRETORIA Applicant/Appellant

and

BUTI WILLIAM MTSHALI Respondent

Date heard: 14 June 2016

Date delivered: 20 June 2016

JUDGEMENT: APPLICATION FOR LEAVE TO APPEAL

DE VOS J:

[1] This is an application, brought by the Director of Public Prosecutions: Gauteng, Pretoria (the 'OPP') in terms of the provisions of s 310A of the Criminal Procedure Act

51 of 1997, for leave to appeal against a sentence imposed on the respondent on the 4th December 2012. It is common cause that on that day the respondent was sentenced by the Regional Court Magistrate, Mokopane, to five years imprisonment wholly suspended for a period of five years on count 1 (rape), and to a fine of R2000,00 or 12 months imprisonment on count 2 (attempted murder). The respondent was charged with only one count of rape, although it appears from the facts - as will be discussed later - that the complainant was raped twice. For purposes of this judgement I deal with one count of rape only. The application for leave to appeal was filed at the Registrar of the High Court, Gauteng Division, Pretoria on the 2ih November 2014. This application was brought almost 23 months after the sentence was imposed. The applicant also filed an application for condonation for the late filing of the application for leave to appeal. Both applications are opposed by the respondent.

[2] Section 310A(2)(a) of the Act reads as follows:

> '(2) (a) A written notice of such an application shall be lodged with the registrar of the provincial or local division concerned by the attorney-general , within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed'.

Du Toit AJ stated in ***Attorney-General, Venda v Maraga*** **1992 (2) SACR 594 (V) at 600A-B:**

> ‘What a good cause is, will obviously depend on the circumstances of each case and will be considered by the Judge in Chambers on the facts of the matter, taking into account also the attitude, submissions and interests of the respondent'.

[3] The applicant filed an affidavit sworn to by Adv HM Meintjies SC setting out reasons and offering an explanation for the failure of the applicant to adhere to the 30-day time limit. Succinctly put, the OPP was not aware of the shockingly light sentence imposed on the respondent until a newspaper article was published in the 'Sunday Times' on 26 October 2014. Since then every effort was made to avoid any further delay and to file the application as soon as was reasonably possible. Adv Meintjies SC says in her statement that prosecutors are instructed and are obliged to bring inadequate sentences to the attention of the OPP. Upon enquiry to the senior prosecutor stationed at Mokerong Magistrates' Court, Adv RF Mashamaite, as to why the sentence was not brought to the attention of the OPP, Adv Mashamaite was unable to offer an explanation

for this failure, suffice to say that the prosecutor who prosecuted the respondent was experienced and left the employ of the National Prosecuting Authority to become a magistrate with effect from 01 October 2013. She herself, as the senior prosecutor, was also not made aware of the sentence. The OPP did not obtain an affidavit from the relevant prosecutor/magistrate. Adv Meintjies SC merely states in her affidavit that had the prosecutor still been employed by the National Prosecuting Authority, the appropriate internal disciplinary procedures would have been implemented. Idealistically, circulars and directives containing instructions to prosecutors would always be followed and the state machinery would meet the expectation of working properly. Realistically this is not the case. It is the applicant's contention that the OPP cannot be held accountable for the conduct of a prosecutor under such circumstances. In the absence of any explanation by the prosecutor who handled the matter, this court must accept that the prosecutor either accepted the sentences imposed as in accordance with the law, alternatively failed to understand the need of the victim and to bring justice to the victim, the accused and the community according to the law of this country. In the absence of any explanation by the prosecutor and accepting the DPP's version that their office was unaware of the sentence imposed, I consider it necessary to look at all the facts before me and weigh it up against the interest of justice before deciding whether condonation should be granted or not. For that reason I do not intend to deal with the application for condonation separately from the merits of this case.

[4] It is also common cause that the applicant seeks condonation for the late filing of its heads of argument. The respondent, in turn, also seeks condonation for the late filing of his opposing affidavit to the applicant's application for condonation as well as his heads of argument. All these applications will be dealt with together with the merits of the application for leave to appeal before me. The following should, however, be noted. No replying affidavit to the respondent's opposing affidavit was received, and no opposing papers have been filed in response to the respondent's application for condoning the late filing of his heads of argument and opposing affidavit to the applicant's condonation application. In the absence of any opposition to these two condonation applications brought by the respondent, condonation is granted for both the late filing of the opposing affidavit as well as the late filing of heads of argument. Adv Marika Jansen van Vuuren, the Deputy Director of Public Prosecutions at the Office of the OPP: Gauteng, Pretoria, also filed an affidavit explaining why the heads of argument filed by the applicant was late. It is clear from this affidavit that due to the OPP moving offices

during the time that heads of argument were expected a delay was caused the unavailability of laptops and printers and the absence of electricity in the new building. Iam satisfied that condonation should also be granted for the late filing of the applicant's heads of argument.

[5] I will now deal with the condonation of the leave to appeal application which was brought out of time. The applicant's main contention is that it is in the interest of justice that leave to appeal against the sentence be granted, and that the delay in bringing the application is a direct result of the prosecutor's failure to report the matter to the OPP. It is conceded that legal certainty requires that litigation should come to an end. However, although the application is prejudicial to the respondent, the interests of the respondent are not the only consideration that should be taken into account and therefore it is prayed that leave to appeal should be granted.

[6] The first aspect to be considered is the interest of justice, which requires a factual examination. It is common cause that according to the evidence of the complainant she had a love affair with the respondent before the incident. It ended a year before the incident. The complainant and the respondent were co-workers at L G R. The respondent was her supervisor. On the 9th December 2011 and during the execution of their duties they went to a certain place called "R", situated on the premises of the lodge. The complainant testified that the respondent asked her to have sexual intercourse with him. She refused. The respondent then pulled her into a toilet cubicle, tearing her T- shirt. He forced her to undress and to kneel against the toilet seat. He then and there inserted his penis into her vagina from behind, without her consent. She was screaming and calling for help. Thereafter they went outside and back into the motor vehicle. Instead of going to the office the respondent drove into the bushes. According to the complainant he told her that he does not want to go to prison. The respondent stopped in the bushes. He pulled the complainant out of the motor vehicle; she broke loose and ran away. The respondent pursued her. He caught up with her and hit her head against a stone and brought her back to the car. As they took off, the complainant tried to escape once more and jumped out of the vehicle. She ran away. The respondent again caught up with her. He grabbed her and pulled her back to the motor vehicle where he took the lid of a cast iron pot and hit her on the head with it. He hit her several times and he also hit her with his fists. She lost consciousness and when she regained it she found herself inside the boot of the car. At that stage she overheard the respondent talking to somebody over the telephone, telling that person that he does

not know where she is. Thereafter the respondent opened the boot. He told her that he was no longer going to kill her as it appears that others know that they left "R" together. While she was inside the boot the respondent hit her with the jack of the motor vehicle again, as well as with his fists. He took her out of the boot, put her inside the motor vehicle and drove away. Before they reached their destination the respondent raped her again. On arrival at her place of residence the complainant reported the matter and thereafter she was transported to the police station as well as to the hospital. She was examined by Dr Motanyane. The doctor concluded that the possibility of a sexual penetration taking place cannot be ruled out. The doctor also noted several injuries sustained by the complainant. There were deep scalp lacerations and also a laceration of the left knee. Her right ear was tom. There was a fracture on the fifth proximal failings - that is a bone of the finger - and a bone in the palm of her hand was also fractured. Her vest and jeans were torn and blood-stained. The court a quo accepted the version of the complainant and accordingly convicted the respondent on counts 1 and 2. The respondent's version was rejected by the court a quo. The court concluded that the nature of the injuries sustained by the complainant was such that she was in pain, and that the court cannot arrive at the conclusion that she consented to sexual intercourse. The court also found that the respondent had the motive to attack the complainant on that particular day. He realised that after he forced himself upon her and had sexual intercourse with her she was going to report him for rape. He did not want to go to jail and that made him decide to destroy the evidence by killing her. The court also found that the manner in which the respondent hit the complainant with his fists and the car jack while she was in the boot of the car, as well as the nature of the injuries that he inflicted on her are such that the only conclusion to be arrived at is that the respondent had intended to kill her.

[7] On reading the sentence imposed by the magistrate it becomes quite clear that two factors mainly influenced the magistrate to decide against the imposing of direct imprisonment. The first factor is that when the respondent divorced his ex-wife the court granted custody and care of the minor children born from that marriage to the respondent. The second factor of importance is that the pre-sentence report handed in during the trial dealt extensively with the best interest of the children, which was paramount in deciding what a suitable sentence would be. The state contends that the magistrate misdirected himself in that there was insufficient information before the trial court to substantiate findings that the respondent was the "caregiver" of the children. It

appears as if the magistrate accepted that the respondent was the primary caregiver whilst the evidence that on record is to the contrary. It seems that the magistrate relied on ***S v M (Centre for Child Law as*** **Amicus Curiae) 2007 (2) SACR 539 (CC)** to reach a conclusion that direct imprisonment is inappropriate as the respondent as primary caregiver of the children is of sufficient importance to decide not to impose imprisonment. I agree with the state's contention that the Court a quo misdirected itself in this regard. The court a quo disregarded the evidence in the pre-sentencing report that the respondent's children were left with their paternal grandmother to look after them when he took up employment elsewhere. This evidence was placed before the court in the context that the respondent is the breadwinner of the family but not the primary caregiver. The court a quo ignored the fact that for years since the divorce he maintained his children but did not live with them or cared for them on a daily basis. There was, in fact, no proper investigation into what the position of the children would be should imprisonment be imposed. The court a quo also found that the complainant and the respondent were 'involved in a situation which became out of their control'. This was considered to be a mitigating factor in sentencing. This is clearly a misdirection. Even rape within a marriage by a husband on his wife is an offence. In such instances, the fact that a perpetrator is the husband - or, as in this case, a former boyfriend - of the complainant cannot be regarded as mitigating. A woman has an inherent and constitutional right to refuse intercourse. Be it in a marriage or any other relationship. To consider a tumultuous relationship as an excuse on behalf of the perpetrator for committing this type of offence, or for having to endure the commission of the offences as the victim in this matter, has no sound legal basis.

[8] It is clear from the authorities that sentencing officers cannot always protect children from the consequences of direct imprisonment. The relationship between an accused, convicted of serious crimes, and his children are merely one of the factors to be weighed up in each given case in determining a proper sentence. Children cannot be used as an excuse to avoid incarceration. See ***S v Chetty*** **2013 (2) SACR 142 (SCA) para 13.** The trial court has the duty to satisfy itself that, should imprisonment be imposed, the children will be taken care of. It appears to me that the trial court allowed the interest of the children to override all the other aims of sentencing. This caused the dictum in ***S v M*** to be incorrectly applied. It is clear from the record that the magistrate did not have sufficient information before him to substantiate the finding that the respondent was the caregiver of the children and that the best interest of the children

was of paramount importance in deciding what a suitable sentence would be. In my view, the court a quo's finding that substantial and compelling circumstances existed on the part of the respondent, cannot be upheld.

[9] It is further of importance to note that the impact of the offences on the victim was not really taken into account by the sentencing magistrate. The judgement on sentence creates the impression that the victim brought the offences down on herself through her own behaviour. The complainant's objective evidence is that she has suffered severe psychological trauma as well as physical scars due to the attacks. There is not a single reference in the judgement on sentence to the physiological or psychological effects that the offence had on the victim. In contrast, the court a quo actually went so far as to label the victim an aggressive person.

[10] The respondent's submissions that the magistrate did not misdirect himself in imposing sentence are unfounded. The respondent relies on the fact that the magistrate found that substantial and compelling circumstances are present and in fact considered the triad of **S *v Zinn* 1969 (2) SA 537 (A)** before arriving at the sentence as a result of the particular circumstances surrounding the matter, and taking all the factors into account. The respondent contends that the pre-sentencing report was compiled by the social worker and the content thereof was not put into dispute by the state. The magistrate applied his mind to the questions and listed authorities in justification for imposing a lesser sentence. The guidelines set out in **S *v M*** have the purpose to promote consistency of treatment and individualisation of outcome. The respondent contends that the magistrate also did not err in imposing a wholly suspended sentence. The respondent relies on the magistrate's judgement in his commentary to the appeal proceedings that he did not impose a minimum sentence due to substantial and compelling circumstances being present and therefore s51(5)(a) of the Act is not applicable. It is further contended that the magistrate did indeed take into account the effect of the offence on the victim but that the magistrate stated that unfortunately the accused and the victim are not the only people which he must take into consideration. It is further contended that the respondenfs personal circumstances were not overemphasised and that the most emphasis was put on what would be in the best interest of the minor children since the respondent is their primary caregiver. I have already dealt with most of these aspects in this judgment. In my view, these submissions do not assist the respondent at all. On his own argument the interest of the minor children constitutes the main reason for the magistrate's decision not to impose

direct imprisonment. This approach by the magistrate is clearly based on incorrect facts and constitutes a serious misdirection.

[11] The magistrate misdirected himself in overemphasising the personal circumstances of the respondent and underemphasising the seriousness of the offence and the interest of the community. It has been said in several cases that in sentencing, especially regarding crimes like rape or murder, the emphasis should be on retribution and deterrence and that the rehabilitation of the offender will consequently play a relatively smaller role. **See S *v Malgas* 2002 (2) SA 1222 at 1236E; 2001 (1) SACR 469 (SCA) at 284F.** See also **S *v Nkwanyana & Others* 1990 (4) SA 735 (AD) at 749C-D; S *v Mhlakaza & Another* 1997 (1) SACR 515 (SCA) at 5190-E** and **S *v DI Blasl* 1996 (1) SACR 1 (A) at 10F-G.**

[12] Insofar as the merits of this application is concerned it is my finding that the applicant has a reasonable prospect of success on appeal and that the only question which remains is whether the applicant should be granted condonation to embark on this process. I have already referred to the matter of ***Maraga.*** The OPP informed the court that their office was unaware of the sentencing process in this matter until there was a report in the 'Sunday Times' that caused them to investigate and institute the present proceedings. It is clear that the applicant only became aware of these facts after the expiration of the 30 days allowed by the Act. The respondent's main argument in this regard is that the prosecutor, being the delegated representative of the applicant in lower courts, should have informed the applicant if she was of the opinion that the sentence was inappropriate, in order to consider an application in terms of s 31OA of the Act. In ***Maraga*** the court held that the ignorance of the applicant caused by a lack of action from a prosecutor may not always be considered "good cause". The court justified this by saying that it is in the interest of justice that litigation comes to an end in order to ensure legal certainty. See ***Maraga* at 601.** In the present matter it is common cause that the applicant did not file a statement by the prosecutor. Although no statement was filed by the prosecutor, the record shows that the prosecutor agreed with the magistrate that there are sufficient circumstances present for not imposing a minimum sentence. Against this background I must also consider the respondent's present position. The respondent only became aware of the present application when it was served on him during December 2014. The respondent, in the interim period after the sentence had been imposed and receiving the said application, obtained employment as a chef in Sierra-Leone. I have considered the fact that a belated appeal

against a sentence imposed for a criminal conviction may evoke a public interest in the matter of the law's delays. I have further considered that the late filing of a notice of appeal may particularly affect the respondent's interest with regard to the finality of his judgement. When the time for noting an appeal has lapsed, he is prima facie entitled to adjust his affairs on the footing that his judgement is safe. See **S *v Sasson* 2007 (1) SACR 566 (CC).** I have also weighed up the interest of the victim, the interest of the public in the sense that the public's trust and confidence in the criminal justice system must be upheld, the proper administration of justice in the sense that justice must not only be done but must also be seen to be done, as well as the interest of all in seeing that the law is correctly and consistently applied. Against these factors I also weighed up the fact that it is a presiding officer's duty to ensure that legislative prescripts are adhered to in the best interest of justice.

[13] As briefly mentioned before, the senior prosecutor stationed at Mokerong Magistrates' Court employed by the National Prosecuting Authority deposed of an affidavit stating that she, Reneilwe Francina Mashamaite (the senior prosecutor), has occupied this position since the 2nd January 2007. Her duties include inter alia the supervision of prosecutors in Mokerong, Naboomspruit and Mokopane Magistrates' Courts. As such it is impossible to be aware of all cases that are heard in the aforesaid courts. The sentence imposed in the case of the respondent was never brought to her attention by the prosecutor who handled the matter. However, had she been informed of this shockingly light sentence, she would have immediately brought the matter to the attention of the office of the OPP, Pretoria for purposes of noting an appeal against the imposed sentence. She does not know why the prosecutor did not bring this matter to her attention. Apparently, according to her statement, she only became aware of this matter on the 22nd October 2014 when she received an email enquiry from the DPP's office regarding this matter. It appears that there is no explanation before the court for the failure of the prosecutor who prosecuted the respondent to report this matter to the senior prosecutor immediately after sentence was imposed. One can only speculate as to reasons for this failure. Against this I must also consider the importance of the case, the prospects of success on appeal, the respondent’s interest in the finality of the judgement, the convenience of the court and the avoidance of unnecessary delays in the administration of justice. In the matter ***Engelbrecht v Khumalo*** **(case no. 2013n3273 handed down on 18 March 2016)** Mlambo JP held at **paras 7 and 8:**

> '[7] . . . that the good cause test is not all-embracing but is case-specific. This

entails a balanced and common sense appraisal of the individual facts and circumstances of the matter.

[8] In ***Torwood Properties (Pty) Ltd v SA*** **Reserve *Bank*** [1996 (1) SA 215 (W) at 2288] it was stated: "The overriding consideration is that the matter rests in the judicial discretion of the court, which discretion is to be exercised having regard to all the circumstances of the case". In ***Soller*** **(supra) para 9** [2005 (3) SA 567 (T)] Ngoepe JP noted that the existence of good cause depended on the facts and circumstances of each case. See also *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd and* Others [[2012) 1All SA 135 (SCA)] where the SCA stated: "Ultimately, what will constitute good cause in any particular case will depend upon the facts of that case" . . . In this context a court would consider whether on the facts before it an arguable case calling for an answer . . . is made out and whether it is fair, just and equitable between the parties to grant or refuse consent. Simply put the issue is whether the proceedings ... contain a justiciable issue'.

[14] It is common cause that if the time for noting an appeal has lapsed an accused is prima facie entitled to adjust his affairs on the footing that his judgement is safe. See S *v Sasson.* Applying the test for an application for leave to appeal as set out in S *v Smith* 2012 (1) SACR 567 (SCA) para 7, I have already concluded that there is a sound, rational basis for the conclusion that the applicant has a good prospect of success on appeal. In weighing up the interests of justice against the personal interests of the respondent, I am of the view that public interest as well as that of the victim overshadows the interest of the respondent to such an extent that the applicant's late filing of the application for leave to appeal should be condoned. The message sent to the community by imposing a suspended sentence where a woman was violently raped is in direct conflict, not only with the legislation on minimum sentences, but also with the general trend of sentencing by the courts of South Africa and the message these courts strive to send out to community

[11] Accordingly, I make the following order.

1. Condonation is granted to the applicant for the late filing of the notice of appeal and/or heads of argument;
2. Condonation is granted to the respondent for the late filing of his opposing papers and heads of argument;
3. Leave is granted to the applicant to appeal to the Gauteng Division of the High Court, Pretoria, on the sentences imposed on counts 1 and 2 respectively, on the

grounds as set out in the notice of appeal.

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DE VOS J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

For the applicant:	Adv. J Cronje Instructed by The Director of Public Prosecutions: Gauteng, Pretoria
For the respondent:	Adv. W J van Wyk Instructed by Klynveld-Gibbens Incorporated c/o Johan van de Vyver Attorneys