OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION: PRETORIA

CASE NO: A451/2015

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

1/4/2016

In the matter between:

FANA MARTIN SIBIYA APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

MSIBI AJ

[1] The appellant was charged in the Regional Court, Nigel Mpumalanga with Rape, Kidnapping and Assault with the intent to inflict Grievous Bodily Harm on S. H. a 24 year old woman.

[2] the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 applied on the count of Rape.

[3] On 19 March 2015 the appellant was convicted on all 3 charges. The Regional Magistrate, proceeded to consider whether or not substantial and compelling circumstances as contemplated in section 51(3)(a) existed. The trial court found that there were no substantial and compelling circumstances warranting deviation from the minimum prescribed sentence.

[4] On the first count he was sentenced to ten years imprisonment. On the second count to 3 years imprisonment. On the third count to 1 year imprisonment. The trial court ordered that sentences should not run concurrently. Thus the effective sentence was 14 years imprisonment. Applicant was granted for leave to appeal on sentence only.

[5] Counsel for the appellant submitted

Firstly- that the trial court misdirected itself in finding that there were no substantial and compelling circumstance to justify the imposition of a lesser sentence than 10 years on the charge of rape.

Secondly- that the trial court misdirected itself in failing to consider the cumulative effect of the sentences imposed.

[6] The evidence disclosed that the complainant S. H. and her boyfriend G. N. M. were in bed early in the morning hours of 12 May 2013. S. went out of her home at approximately 6:45 to go to the veld to relieve herself as usual. At the veldt she was approached by the appellant, who requested her to accompany him. When she refused the appellant started to pull her. When she resisted he hit her with fists on her mouth, he pulled her to a more secluded part of the veld while threatening to kill her. After giving her instructions to undress. She did and also lay down as requested.

[7] He put his knee on her chest and told her that he would kill her and throw her body into the nearby tarred road thereafter. He raped her without a condom. When she screamed he strangled her, causing injuries that were observed and recorded by the doctor on Exhibit A; the J88. After he had finished raping her he got up and she also got up and ran to her home.

[8] Mr M. had already woken up upon her return to the house. He noticed that she was bleeding from her mouth and she was crying. She reported that the appellant, who was well known to her, had raped her.

[9] Constable Masy Meme Mkonjane testified that she was the investigating officer in the case. It took her long to arrest the accused since he could not be traced.

[10] The appellant, Martin Fana Sibiya testified that the complainant was his girlfriend. He had a prior arrangement to meet with the complainant. On that date they met and had consensual sex and they argued, appellant then assaulted her.

[11] It is on record that the complainant and the appellant lived in the same neighborhood.

[12] The appellant was 33 years old while complainant was 24 years old at the time of the commission of the offence. There is an age gap of 9 years between the victim and the perpetrator.

[13] The J88 was admitted as Exhibit A which reflected injuries to her mouth, her neck and genitals. The DNA results were admitted as Exhibit B.

[14] <u>The court will now deal with sentence on count (1).</u>

In **S V RABIE 1975 (4) ALL SA 723 A** the court summarized the legal position as follows: *"In every criminal appeal against sentence, whether by* a *magistrate or* a *judge, the court hearing the appeal.*

(a) *Should be guided by the provision that the punishment is pre- eminently* a *matter for the discretion of the trial court and*

(b) *Should be careful not to erode such discretion, hence the further principle that the sentence should only be altered if the discretion has not been judicially or properly exercised."*

The test under para. (b) is whether sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

[15] Counsel for the appellant referred this court to **S V NKOMO 2007** (2) **SACR 198 (SCA)** wherein the court held that although it was difficult to imagine a rape under much worse conditions, it was still able to impose a lesser sentence as opposed to the one prescribed by the legislature after finding that substantial and compelling circumstances existed.

[16] In the present matter, the trial court, after having considered all relevant factors on sentence, the crime and the personal circumstance of the appellant, made a finding that substantial and compelling circumstance did not exist.

[17] In the NKOMO case mentioned above the court of appeal imposed a lessor sentence, deviating from the prescribed minimum sentence after finding that substantial and compelling circumstances existed that called for deviation from imposing a minimum sentence.

[18] In respect of the present matter on count 1 counsel for the appellant is further submitting to this court to consider the cumulative effect of the following factors in order to establish the existence of substantial and compelling circumstances.

(1) that appellant is a first offender.
(2) that appellant has been in custody while attending trail.
(3) that this is not worst rape scenario
(4) that the extend of the trauma suffered by the complainant was unknown
(5) that no evidence was led to the effect that appellant cannot be rehabilitated.

[19] The general approach on imposing sentence in terms of Act 105 of 1997 was considered in **S V MALGAS 2001** (3) **ALL SA 220 (A) para 25[8].** It was held amongst others that *"courts* are *required to approach imposition of sentence conscious that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment* as *the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances."*

[20] At **Paragraph [25) D Marais JA** further states that: *"The specified sentences are not to be departed from lightly, for flimsy reasons, speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisonment of first offenders, personal doubts as is efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."*

[21] At **Paragraph G Marais JA** further states that: *"The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yard stick. They must be such* as *cumulatively justify* a *departure from the standardized response that the legislature has ordained."*

[22] Functions of the courts of appeal.

On Sentence:

In S **V PILLAY 1977 (4) SA 531 (A) para 535 F-G** the court set out the correct approach in an appeal against sentence as follows: *"The essential inquiry in all appeal against sentence is not whether sentence was right or* as *wrong but whether the court in imposing sentence executed its discretion properly or judicially,* a *mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with sentence. It must be of such* a *nature, degree of seriousness that it shows directly or inferentially that the court did not exercise its discretion at all or exercised it improperly or unreasonably."* The same cannot be said about the sentence of the trial magistrate, in the case before us.

[23] This court cannot say that the trial magistrate did not exercise his discretion at all or exercised it improperly or unreasonably on sentence. The trial court correctly found that there were no substanstial and compelling circumstances that warranted a deviation from the prescribed minimum sentence on count 1.

[24] Cumulative effect of all 3 sentences.

Counsel for appellant submitted what the charges were from one incident, the actions were closely related to each other. Counsel for the respondent submitted

these are different charges; especially count 1 is regulated under Act 105 of 1997. The trial court is the court that had the privilege to listen to, and see all witnesses as they testified. The court exercised its discretion on conviction and sentence based on its first hand observations.

[25] In **STATE VERSUS CHAPMAN 1997(3) SA 341 SCA at p.345 D ,** the court remarked as follows " *the courts are under* a *duty to send* a *clear message to the accused, to other potential rapists and to the community, We are determined to protect the equality* , *dignity and freedom of all women* , *and we shall show no mercy to these who seek to invade those rights." In casu* appellant invaded the complainants' body, humiliated her and striped her of her dignity.

[26] Having regard to the above mentioned, this court is not persuaded that the *court* a *quo* misdirected itself in imposing the sentence of 10 years imprisonment on counts 1 and the subsequent order that sentences should not run concurrently.

[27] **Accordingly the following order is made.**

The appeal on sentence is dismissed.

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MSIBI S M
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA

I agree

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VORSTER L I
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA

HEARD ON: 08 MARCH 2016

DELIVERED ON:

COUNSEL FOR APPELLANT: ADV L A VAN WYK

ATTORNEYS FOR APPELLANT: PRETORIA JUSTICE CENTRE

COUNSEL FOR RESPONDENT: ADV M VAN VUUREN

ATTORNEYS FOR RESPONDENT: STATE ATTORNEY