IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

Case number: A274/2018

Date of hearing: 3 June 2019

Date delivered: 12 June 2019

In the matter between:

REUBEN SHIKWAMBANA Appellant

and

THE STATE Respondent

JUDGMENT

SWANEPOEL AJ

THE CHARGES

[1] Appellant was charged in the Pretoria Regional Court with three counts:

1.1 Kidnapping: In that on or about 28 January 2014 and at Mamelodi he unlawfully and intentionally deprived M[….] N[….] ("the complainant") of her freedom of movement by forcefully taking her to Mamelodi and threatening to kill her should she try to run away;

1.2 Contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, in that on 28

January 2014 he unlawfully and intentionally committed an act of sexual penetration with the complainant without her consent;

1.3 Contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, in that on 29 January 2014 he unlawfully and intentionally committed an act of sexual penetration with the complainant without her consent.

[2] Counts 2 and 3 carry a minimum sentence of 10 years' imprisonment in the event of the accused being a first offender, by virtue of the provisions of section 51 (2) (b) read with Part Ill of Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997, a fact of which appellant was alerted in the charge sheet.

[3] The appellant pleaded not guilty to all counts, and in a plea explanation he stated that he and the complainant were lovers and that she had gone with him voluntarily. He stated that they had had intercourse with the complainant's consent. He denied that he had kidnapped the complainant.

[4] The appellant was duly convicted and sentenced to 4 year's imprisonment on count 1, and ten years' imprisonment on each of counts 2 and 3. The imprisonment in respect of count 3 was ordered to run concurrently with that on count 1, effectively a sentence of twenty years' imprisonment. This appeal is against both conviction and sentence.

THE EVIDENCE

[5] The State called the complainant to testify. A brief synopsis of her evidence is as follows:

5.1 She met the appellant for the first time on the morning of 28 January 2014 when she went to drop her children off a creche in Ekangala. He approached her and asked whether she was looking for a job, and when she confirmed that she was, he told her that there was employment available at a shop in Cullinan where he was then working. They agreed to meet at Cullinan where he would introduce her to his employer.

5.2 The complainant left her children at the creche and went home to

advise her husband that she was going to Cullinan to look for a job. Knowing that he would object should she tell him that she was going with another man, she told him that she was going with a woman. Her husband was not happy to let her go, but she left nonetheless.

5.3 Upon her arrival in Cullinan she met up with appellant. They found a lift which took them to a four-way stop where they alighted. They started walking to appellant's place of employment. They walked a long way and whenever she asked where they were going, appellant kept saying that the place they were going to was further along.

5.4 Eventually complainant became: apprehensive and told the appellant that she was leaving, at which point he took out a knife and threatened her. He said he would cut her throat unless she did what she was told. He later told her that they were going to his place in Mamelodi.

5.5 During this ordeal appellant told the complainant that she should act in such a manner that they looked like a couple. He said his job was killing people and that he had previously killed a woman. He also stated that he had been sent to kill her, and that if he could not kill her, he would kill her husband.

5.6 Upon their arrival in Mamelodi they eventually found accommodation at the home of one R[….] M[….]. She gave them a bed to sleep in, and when the complainant wanted to sleep on a sofa, the appellant insisted that she should sleep in the bed with him. It was at that point that appellant started to undress the complainant and himself, whereafter he raped her.

5.7 The following day they left Masoga's place and walked a long way until at one point they entered a bushy area where he raped her again. They then proceeded to appellant's brother's place where they were given money. They boarded a taxi and returned to Ekangala. Appellant asked for her cellular telephone number, and

they separated. The complainant went straight to the police station to report the events.

[6] The State also called Masoga who testified that appellant had asked her for accommodation and food. Masoga specifically noticed that the complainant was acting strangely. She was withdrawn and quiet and was not responding to anything. The following morning when she offered them breakfast, appellant was the only one who responded to her. The complainant was still quiet, to such an extent that Masoga took note of her strange conduct. That concluded the State's case.

[7] The court refused an application for a discharge in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977. Appellant testified that he had known the complainant for some four months and had been involved in a relationship with her. They planned a trip to Bronkhorstspruit or Mamelodi so that she could meet his relatives. The complainant left her children at the creche and told him that her sister in law would care for them. They met up later at a four-way stop where she told him that he did not need to worry about her husband because he worked in Kempton Park during the week and only returned on Fridays. The complainant also suggested that they should go to Mamelodi.

[8] For some reason they found a lift with a vehicle going to Cullinan where they purchased food. They waited a while and by the time the sun was setting they found a lift to Mamelodi. They could not visit his family because it was already late and they would not have approved of him having a girlfriend, as he was already staying with another woman. They could not find accommodation, and eventually they ended up at Masoga's home.

[9] He denied that he had raped her, and although he admitted having intercourse with the complainant, he alleged that it was consensual. The following morning they left Masoga's place and went to Mama Fikile's business. There he introduced the complainant to his cousins and told them that she was his second wife. Everyone welcomed the complainant and appellant explained to his cousins that he had had a disagreement with his wife. The complainant also explained that she had had a falling out with her husband, and that she was in a

relationship with appellant. They eventually left Mamelodi at 17h00 having spent the day with his family and they eventually separated in the vicinity of the creche in Ekangala. He denies having intercourse with the complainant in a bush on 29 January 2014.

[10] At some stage appellant was apprehended by a police officer who had a description of the complainant's rapist. He apparently recognized the appellant from the description and duly arrested him. The complainant later pointed appellant out at an identity parade. That concluded the evidence

EVALUATION OF EVIDENCE

[11] The court a *quo* found the complainant to be a credible witness and the evidence .of the appellant was rejected as being false beyond a reasonable doubt. In our view there is no reason to fault the court a *quo's* credibility finding. On the one hand, the complainant was a straightforward witness who even volunteered that she had misled her husband by saying that she was going to Cullinan with a woman. She could have left out that information to protect her credibility. The fact that she was forthcoming about lying to her husband is indicative of her credibility.

[12] The complainant's evidence reveals a woman who was so scared by the threats of violence to herself and to her husband, that she was willing to go along with whatever the appellant wanted her to do. Her evidence is supported by that of Masoga. Masoga's testified that something was clearly bothering the complainant. She was withdrawn and unresponsive, to such an extent that Masoga even asked appellant what was wrong with her. This evidence supports complainant's version that she was being held against her will. Furthermore, when the complainant eventually escaped the appellant's clutches, she went straight to the police station to report the rape. It is inexplicable that a woman who was with a man of her own free will, would suddenly make false and very serious allegations against him, unless she had in fact been raped.

[13] On the other hand one has the convoluted version of the appellant. He testified that he specifically wanted to show off his new girlfriend to his family in Mamelodi, but for some reason they ended up going to Cullinan. When he eventually reached Mamelodi and he had to introduce the complainant to his

family he demurred, on the grounds that it was late and that they would not approve of him having another girlfriend.

[14] Whereas they initially intended to go to his place in Mamelodi, they ended up not having anywhere to spend the night, and they had to approach a stranger to help them with accommodation.

[15] What is strange about appellant's version is that having allegedly had this long standing relationship with the complainant, and having introduced the complainant to his family, one would have expected the appellant to try and contact her again after the incident. He did not do so.

[16] Furthermore, even though there is no onus on appellant to prove his innocence, one would have expected the appellant to call his cousins to testify. They could have confirmed that he had introduced the complainant to them, and that she had told them that they were involved in a relationship. It would have been incontrovertible evidence of the truth of his version. He did not do so, in our view, because he had fabricated a version. In our view the court a *quo* was correct in rejecting appellant's version. In the circumstances the appeal against conviction should be dismissed.

SENTENCE

[17] The appellant was 44 years old when the offences were committed. In a pre-sentence report it was reported that appellant still maintained that he had been involved in a relationship with the complainant and that they had travelled to Mamelodi at complainant's insistence so that she could meet his family. The appellant was therefore still not prepared to accept responsibility for his actions. The pre-sentence report indicates a complete lack of remorse.

[18] Appellant is unmarried and has two children, one that was 18 years, and the other 3 years of age at the time of sentencing. He was unemployed and had experienced difficulty in obtaining employment. He is not a first offender, but none of his previous convictions were for offences of a sexual nature.

[19] The offences were particularly abhorrent. Both the kidnapping and the rapes would have been traumatizing for the complainant. The appellant took advantage of the complainant's desperation to obtain employment. He knew that

she was vulnerable and he exploited that vulnerability. The offences were committed over a span of more than 24 hours. In that time the complainant was threatened that she would be killed, and also that her husband would be murdered, should she not cooperate. She was completely at the mercy of the appellant who showed her no mercy.

[20] The incident nearly cost the complainant her marriage, and has left her psychologically scarred. The complainant's mother-in-law reported that the incident had traumatized the entire family and that it had destroyed the complainant's husband's trust in her.

[21] In considering whether to interfere in a sentence, an appeals Court must bear in mind that the sentence is preeminently a matter for the discretion of the trial court. **(The *State v Skenjana 1985 (3) SA 51 (A))*** It is not for this Court to usurp the sentencing discretion of the trial court.

[22] The court *a quo* quite correctly considered the so-called 'triad', the personal circumstances of the appellant, the seriousness of the offences, and the interests of the community. **(See: *The State v Zinn 1969 (2) SA 537 (A) at 540)*** The personal circumstances of the appellant are unremarkable, and there are no mitigating factors. He was not a young man, and he should have known better than to kidnap and rape a woman 18 years his junior.

[23] As far as the offences are concerned, rape is one of the most serious crimes. These Courts are faced with these cases on a daily basis and rape seems to be becoming more and more prevalent. Victims are often targeted specifically because they are vulnerable, or, as in this case, desperate for a job. Not only does the offence have a devastating impact on the victim, one finds that it has a ripple effect on the families of both the complainant and the victim that lasts for years afterwards. It is an offence that goes to the very fabric of our society, harming relationships, reputations and causing enormous psychological harm. As stated in ***Skenjana (supra at* 55 *B)*** a Court must give recognition to the natural indignation and the fears and apprehensions of interested parties and the community at large, in considering a sentence for such a serious offence.

[24] The legislature has found it necessary to impose minimum sentences for those convicted of rape. The legislation clearly reflects the revulsion that society feels towards this crime. Therefore, before a court is entitled to deviate from the

minimum sentence, it has to be satisfied that there are substantial and compelling circumstances that justify the deviation from the minimum sentence.[1]

[25] The manner in which to approach the enquiry into whether there are substantial and compelling reasons to deviate from the minimum sentence was outlined in ***The State v Malgas 2001 (2) SA 1222 (SCA at 1230 I to 1231*** **DJ:**

> *"Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable."*

[26] It was argued on behalf of appellant that an effective sentence of twenty years' imprisonment was excessive . Whether we believe that the sentence is excessive is not the point. As was pointed out by Nicholas JA in ***Skenjana***

[1] Section 51 (2) (b), read with Schedule 2 of The Criminal Law Amendment Act, Act 105 of 1997

(supra), even if we were of the view that the sentence was more severe than that which we would have imposed had we been conducting the trial, the question is whether the trial court exercised its discretion reasonably. As it happens, we agree that there were no substantial and compelling circumstances that justify a lesser sentence, and that the sentence was appropriate. In the circumstances there are no grounds to interfere in the sentence.

[27] **I therefore propose the following order:**

27.1 The appeal against conviction and sentence is dismissed.

·Swanepoel AJ
,Acting Judge of the High Court,
Gauteng Division, Pretoria

I agree and it is so ordered

JANSE VAN NIEUWENHUIZEN
Judge of the High Court
Gauteng Division, Pretoria

(as amended):