REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A365/2018

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

17/9/2019
DATE

MOKOSE SNI

In the matter between:

MORAKE: SHAWN KGOTSO — Appellant

and

THE STATE — Respondent

JUDGMENT

MOKOSE J

[1] The appellant, who had been represented in the trial, was convicted of one count of housebreaking with intent to rape and rape in contravention of Section 3 read with Section 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences Act 32 of 2007 read with Section 92(2), 94, 256, 257 and 281 and Schedule 2 of the Criminal Law

Amendment Act 105 of 1997 and appealed against his sentence only having had an automatic right of appeal.

[2] He had been sentenced to five years' imprisonment on count one and life imprisonment on the second count of rape. The sentence in respect of the first count was to run concurrently with the second.

[3] The complainant testified that she was asleep in her home with her siblings when two intruders broke into the house. She testified that accused 1 (who had absconded and the case against him ordered to proceed at a later date when he was apprehended) threatened her with a knife, undressed her then raped her. When she tried to resist he threatened to use the knife on her. The appellant was sitting on the sofa watching the rape through an open door. After a while, he handed the knife to accused 1 then proceeded to rape the complainant. They left after they had raped her, whereupon she ran to the neighbour to call for assistance.

[4] After the case had commenced and the accused had pleaded, the matter was postponed for evidence to be led on the DNA results. The court ordered a separation of the trial in terms of Section 157(2) of the Criminal Procedure Act 1977.

[5] The trial then re-commenced and the appellant then made formal admissions in terms of Section 220 of the Criminal Procedure Act 1977 and admitted all the allegations contained in the charge sheet in respect of both counts. In particular, he admitted that he had entered the home of the complainant with accused 1 and that both of them had

raped the complainant. The appellant then closed his case without tendering any evidence.

[6] The appellant appeals against the sentence imposed by the Magistrate on the grounds that the sentence was excessive and inappropriate and that the Magistrate had misdirected himself when imposing the sentence by failing to exercise his discretionary power to impose a lesser sentence in circumstances where the minimum sentence is applicable and thus failed to find substantial and compelling circumstances in sentencing the appellant.

[7] It is trite law that sentence is pre-eminently at the discretion of the trial court. The court of appeal may interfere with the sentencing discretion of the trial court if such discretion had not been judicially exercised. The test which has been enunciated in numerous cases is whether the sentence imposed by the trial court is shockingly inappropriate or was vitiated by misdirection. The trial court considers for the purposes of sentence, the following:

(i) The seriousness of the case;

(ii) The personal circumstances of the Appellant;

(iii) The interests of society.

S v Zinn 1969 (2) SA 537 (A)

[8] The provisions of Section 51(1) of Act 105 read with Schedule 2 of the Criminal Law Amendment Act 51 of 1977 were explained to the Appellant prior to him pleading to the charges. The section states that an offender shall be sentenced to imprisonment as per the minimum sentence unless there are substantial and compelling

circumstances to warrant a deviation from the prescribed minimum sentence. The specified sentences are not to be departed from for flimsy reasons and must be respected at all times.

S v Matyityi 2011 (1) SACR 40 (SCA) at 53 E-F

[9] There is no definition of what constitutes compelling and substantial reasons. The court must consider all the facts of the case in determining whether compelling and substantial circumstances exist. The overall guiding principle is that the sentence must befit the crime. The approach was followed by the court in the matter of **S v Rabie 1975 (4) SA 855 at 862 G – H** where Holmes JA said:

"Punishment should fit the criminal as well as the crime, and be fair to society, and be blended with a measure of mercy according to the circumstances."

[10] In mitigation of sentence the appellant placed on record that he was 19 years old at the time of the commission of the crime. He was unmarried with no children. Furthermore, he was a first offender and had spent seven months in custody pending the finalisation of the case.

[11] Counsel for the appellant submitted that the Magistrate had misdirected himself in that he did not take notice of the pre-sentence report handed into court during the trial of the court *a quo* which indicated that alcohol played a role in the commission of the crime. Furthermore, the complainant did not suffer serious physical injuries. And furthermore, the Magistrate failed to take notice of the fact that appellant was remorseful as he had changed his plea and made the admissions when the trial re-commenced.

[12] Factors which aggravate sentence can be divided into those relating to the crime, the offender and the interests of society. Factors which aggravate sentence include:

(i) the seriousness of the crime;

(ii) the after-effects of the crime;

(iii) the planning or pre-meditation of the crime; and

(iv) the problem types of crime.

[13] Factors which a court would take into consideration in sentencing pertaining to the offender would include:

(i) previous convictions;

(ii) the motive:

(iii) the lack of remorse: and

(iv) the abuse of trust.

[14] Factors a court would take into consideration in sentencing relating to society would include:

(i) vulnerable victims;

(ii) attacks on the maintenance of law; and

(iii) the prevalence of the crime.

[15] It is noted from the J88 form that the complainant suffered tears at the 3,6 and 9 o'clock position of the hymen. Rape is not just a physical act but an act which inflicts severe

emotional and psychological trauma on the victim. The complainant, a virgin of a tender age of 14, was severely traumatised by the rape and reportedly suffered from insomnia and self-esteem and continues to bear the psychological scars of the crime. In my view, the appellant's view that the trial court erred by not considering the lack of serious physical injury is disingenuous and unfounded.

[16] It is evident from the record that the Magistrate took the probation officer's report into account in sentencing the appellant. Not only did he give consideration to this but noted that the appellant had failed to indicate how much liquor he had taken and its effects of it in minimising his ability to know what he was doing. Accordingly, I am of the view that the Magistrate did not err in failing to take into account the allegation by the appellant that liquor had played a large role in the commission of the crime.

[17] There is no evidence that the appellant was remorseful. The lack of contrition is demonstrated by the fact that after being granted bail, the appellant absconded, leading to the authorities having to look for him. Furthermore, the appellant pleaded not guilty despite DNA in the form of semen being found on the complainant. Nothing turns on the fact that he subsequently changed his plea and pleaded guilty.

[18] Poonan JA in the matter of **S v Matyityi 2011 (1) SA 40 (SCA) at para 19** said:

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not merely

feeling sorry for himself at having been caught is a factual question. It is the surrounding actions of the accused rather than what he says in court that one should look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined."

[20] Given the seriousness of the crime as well as the mitigating and aggravating circumstances which were taken into consideration by the Magistrate in the court a quo, I am of the view that the Magistrate did not err in sentencing the Appellant. Not only was the complainant under the age of 16 years, so too was the rape was committed by the appellant and another. I am of the view that the court *a quo* was correct in its finding that there were no substantial and compelling reasons to sentence the Appellant to a lesser sentence than that prescribed by the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 nor is there any evidence of the discretion of the Magistrate having been incorrectly exercised.

[21] Accordingly, the following order is granted:

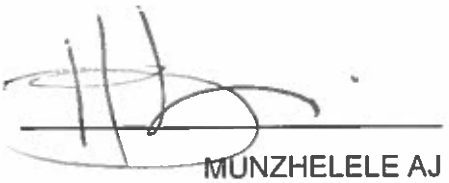
The appeal against sentence is accordingly dismissed.

MOKOSE J

Judge of the High Court
of South Africa

Gauteng Division,
Pretoria

I agree and is so ordered



MUNZHELELE AJ

Acting Judge of the High Court

of South Africa

Gauteng Division,

Pretoria

For the Appellant:

Adv F Van As instructed by

Legal Aid South Africa

Pretoria

For the State:

Adv MJ Makgwatha instructed by

The Office of the Director of Public Prosecutions

Pretoria

Date of hearing: 11 September 2019

Date of judgement: 11 September 2019