(Inlexso Innovative Legal Services) / adn

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A473/2017

DATE: 2019-10-21

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES YES / NO
(3) REVISED.
SIGNATURE
DATE 26/11/2019

In the matter between

MICHAEL CHESTER PHEKO Appellant

and

THE STATE Respondent

EX TEMPORE JUDGEMENT

(ON APPEAL SITTING AS COURT OF APPEAL)

Coram: **KHUMALO J AND CONSTANTINIDES AJ**

Date of hearing: Monday, 21 October 2019.

On the 12 May 2017 the honourable Madam Justice Teffo and Madam Acting Justice Mia, granted condonation for the late filing of the petition. Leave to appeal against

conviction in terms of section 309(c) of Act 51 of 1977 was refused

Leave to appeal against sentence in terms of section 309(c) of Act 51 of 1977 was granted.

This appeal relates to the sentence that was imposed by Magistrate JF Steyn in the Regional Court for the Division of Merafong held at Oberholzer.

The Appellant was legally represented. The Appellant was convicted on one count of rape and one count of theft. The Appellant was sentenced to:

1. 18 years imprisonment on one count of rape.

2. Sentenced to 5 years imprisonment on one count of theft; and

3. Declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

The Appellant appeals against sentences imposed against both counts. The Appellant's name was entered in the National Register of Sexual Offenders (pages 166 and 175 of the record).

The Appellant's argument stated as follows:

"5... The Trial Court misdirected itself by assuming on face value that there were no substantial and compelling circumstances. It did not do the necessary investigation, which may have included having the probation officer report and or calling witnesses to

testify in this matter." (Appellant's heads of argument). The Appellant furthermore submits in his heads of argument that the learned Magistrate:

"8. Approached the sentence with vengeance and overemphasised the seriousness of the offence to the detriment of the Appellant with total disregard of the Appellant's personal circumstances which were not placed on record...

9. In sentencing the Appellant to an effective term of life imprisonment, the sentencing court erred in that it overemphasised the seriousness of the offences which the Appellant had committed and the interests of the society whilst the personal circumstances of the Appellant were not fully placed on record and thus under emphasised...

...in imposing such a lengthy period of imprisonment the sentencing court erred in imposing the sentence which is shockingly harsh and it induces a sense of shock...

13 The Appellant was not required to prove the presence of substantial and compelling circumstances in respect of count 2."

...The learned Magistrate erred in not investigating the presence of same and that a lengthy term of imprisonment imposed by the trial court is not in the best interest of the community and or the Appellant. The public interest is not necessarily served by the imposition of very long sentences of imprisonment. The learned Magistrate erred in not ordering the sentences to run concurrently and in not entertaining the question of 22 years imprisonment that the Appellant was serving at the time of his sentencing (in another conviction)."

"14. An effective period of not more than 15 years imprisonment should have been imposed on this matter and that sentence should be interfered with."

(pages 5 to 8 of the Appellant's heads of argument)

Background

The Appellant was tried together with Alfred Sello Mabena referred to as "the first accused". They were arraigned on four counts namely: count 1: of rape; and, count 2: one of housebreaking with intent to rape and rape; Count 3: theft; and count 4: escaping.

It is common cause that the Appellant was at least at the door of the complainant namely Ntabileng Radebe who was born on the 2 November 1993 and was 11 years of age during

the incident. The dispute relating to counts 1 and 3 by the Appellant related to his identity.

Complainant was on the 19 March 2004 allegedly sleeping in the same room as her brother Nhlanhla Godfrey Radebe. Her brother woke up during the night and he saw the Appellant next to them.

The Appellant was armed with a knife and demanded a phone and money and they had none to give him. Appellant told the brother to get into the complainant's bed and Appellant told them to cover their faces and Appellant pulled off complainant's blankets and made her undress.

He penetrated her with his finger and when she screamed he cut three of her fingers with a knife and injured both her legs with lacerations made with the knife. According to the learned Magistrate, there are still scars on the complainant's fingers.

The complainant observed the Appellant's private part was "coated with something reddish". He then raped her and then told them to cover their faces.

The complainant noted that the Appellant had a scar under his eye and dreadlocks. Complainant's mother confirmed that complainant was bleeding and she suffers from insomnia and nightmares.

Nhlanhla, the brother, also testified that on the 19 March 2004 whilst asleep, he was woken and confirmed what

complainant told the court and he was told to get into his sister's bed on the other side of the wardrobe. Nhlanhla confirmed that he had never met the Appellant before. He also confirmed that the Appellant had a scar on his face and dreadlocks and that Appellant threatened to stab him and that Appellant had demanded a cell phone and money.

Nhlanhla went to report to his parents what he had witnessed and Nhlanhla's father went into the streets in search of the suspect.

Count 2 related to rape and housebreaking with the intent to rape and rape, and the witness was asked by both the state and the defence how the suspect gained entrance and it was stated that he probably entered earlier while the children were in the main house.

The mother of the complainant Ms Elsie Radebe also testified for the state and confirmed that complainant and her brother were sleeping in the shack and that when she was woken by the shouts of Ntabileng the complainant and the brother and when complainant had reported that she was raped, she confirmed seeing blood on the private parts of complainant.

It was also stated the complainant had since become forgetful and is partly deaf. The father of the complainant also testified and confirmed that when he was called to the shack by the children, he saw that there was clothing missing from

the shack and that his daughter reported that she had been raped by the friend of Alfred Sello Mabena, who was referred to as accused No.1.

A further witness for the state Mr Thabo Morai testified that during the night of the 20 March 2004 he saw accused No. 1 and an unknown person run in his direction and they were holding clothes in their hands, but he could not remember which one of them was holding the clothes.

Doctor Slavov who is a doctor at the Carletonville Hospital testified for the state wherein he stated that at quarter past 4 on the 20 March 2004 he examined Ntabileng Radebe and he completed the J88 form. He stated that she had lacerations on her hand and the fingers and above her lower legs, most probably caused by a sharp object.

Doctor Slavov concluded that:

> "The vagina was seriously injured." (page 97 of the record line 2). He stated that there were tears on the vagina and the hymen was not intact. This was the evidence relating to counts 2 and 3.

Accused No.1 testified that he knows the complainant in count 2 and confirmed that on March 10 he met the Appellant, ("accused 2"), at Kganyane Shebeen. At 2:00 in the morning they went to the yard of complainant in count 2 to look for one "Tebogo".

Accused 2 entered the yard and accused 2 went to the

shack and knocked on the shack and he stated the door of the shack was also open then and he confirmed that when Tebogo came out of the yard, accused 1 and Tebogo left and they left accused 2 behind.

Accused 2, who is the Appellant, testified that relating to counts 2 and 3 the rape and theft of clothes that he was at home with one Pinky and Makotula and that he accompanied accused 1 to collect a phone and money from one Tebogo and accused 1 allegedly asked Appellant to call Tebogo.

So he basically confirmed what accused 1 had said in evidence. Appellant allegedly knocked on the shack and he could hear that there was a fight inside and he decided he did not want the company of accused 1 anymore and he did not want to tell accused 1 of the fight in the shack and he "jumped the fence and went to Extension 3". (paginated page 163, line 10 of the judgment of the record).

Appellant (Accused 2), claims due to the aforesaid, he could not be the one who was carrying the goods with Accused 1.

The Magistrate found that the complainant's version in count 2 was corroborated by other witnesses such as her mother who confirmed that complainant's private parts were bleeding. Complainant's version was also corroborated by the doctor.

The Magistrate took into account that the incident happened five years previously. (judgment lines 129, paginated

page 165 of the record).

Furthermore the following was stated by the Magistrate:

"The story of accused 2 that he only knocked but then suddenly decided not to enter is not in line with the story of accused 1 that the door was opened and furthermore it is also strange that accused 2 did not go back with accused No. 1, but he suddenly developed the urge to jump the fence and go on his own." (paginated page 166 of the record- judgment, lines 2 to 5).

The sentencing court considered that the Appellant is 33 years of age, has three previous convictions for housebreaking, assault and theft, he is not married and has one child.

The sentencing court placed on record that the Appellant was convicted of entering the room of an 11 year old girl, raping her and stealing clothes from her closet and this happened in sight of her brother, and during the rape she was bleeding and she soiled herself and she has consequently suffered from bad memory and nightmares. (sentence, paginated page 174 of the record).

The court took into account the fact that the Appellant was in custody pending trial. The respondent's heads of argument state the following:

"4. Sentencing is a matter pre-eminently for the

discretion of the trial court. The court hearing an appeal should be careful not to erode that discretion and would be justified to interfere only if the trial court's discretion was not judicially and properly exercised which would be the case if the sentence that was imposed is vitiated by the irregularity or misdirection or is disturbingly inappropriate" (The respondent's heads of argument paragraph 4, page 2).

10 The respondent deals with the Appellant's submission that the charge sheet only mentioned section 51(2) of the Criminal Law Amendment Act and therefore they had submitted that a maximum term of imprisonment could only be 15 years. The fact that the provisions of section 51(1) of Act 105 of 1997 was not mentioned in the charge sheet, it was alleged that this does not vitiate the application of the provisions of 51(1) of Act 105 of 1997 as amended.

The Appellant was represented by a legal representative and therefore the legal representative would 20 have known that the offence falls within the ambit of 51(1) of Act 105 of 1997 as amended. There are no grounds to justify that the sentences run concurrently.

The respondent is correct in stating that the gravity of the crime and the aggravating features as well as the societal needs for an effective deterrent in such cases, predominates

and outweighs the personal circumstances of the Appellant. (paragraph 14, page 8 of the respondent's heads).

It was furthermore submitted and stated in the heads of argument by the respondent that if the court finds it necessary to interfere with the sentence, the court should find that there were no substantial and compelling circumstances and the fact that the Appellant was not warned that section 51(1) of Act 105 of 1997 applies, was not prejudicial as his trial fell within the ambit of 51(1) of Act 105 of 1997 due to the fact that the victim was an 11 year old at the time of the rape. (paragraph 16, page 8 of the respondent's heads of argument).

In the case of *Martha Sussana Broodryk v S.* [959/2016] [2017] ZASCA 62 reported on the 29 May 2017, the Supreme Court of Appeal stated the following:

> "It is trite law that sentencing is a matter pre-eminently in the discretion of the trial court and a court of appeal will only interfere with the exercise of such discretion on limited grounds."

In S v De Jager and Another 1965 (2) SA 616 (A) 628 h - 629, Holmes JA made the following observation:

> "It would not appear to be sufficiently recognised that a court of appeal does not have a general discretion to ameliorate the sentences of trial courts. The matter is governed by principle. It is the trial court which has the discretion and a court of appeal cannot

interfere unless the discretion was not judicially exercised that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment **is not discretionary, but on the contrary is very limited."**

(Emphasis added).

In the case of *Leonard Thandlibufile Ntuili v S* ([457/2018] Case of [2018], ZASCA 164 reported on the 29 November 2018), the case of *S v Bogaards* was referred to in the aforesaid case (the Bogaards case is cited as: [2012] ZACC 23 BCLR 1261 CC 2013 (1) SACR para 41), wherein the following was stated in the Bogaards case:

"Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with the sentences imposed by the court below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the

sentence is so disproportionate or shocking that no reasonable court could have imposed it."

Upon having considered all the grounds upon which this appeal was noted, and the findings of the sentencing court, this court cannot find any irregularity or misdirection by the trial court. The Magistrate took into account the personal circumstances of the Appellant and found that there are no substantial and compelling circumstances in this case.

And it is proposed the following order be made:

THE APPEAL AGAINST SENTENCE IS DISMISSED.

JUDGE KHUMALO: I concur and it is so ordered.

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KHUMALO J

JUDGE OF THE GAUTENG HIGH COURT

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CONSTANTINIDES, AJ

JUDGE OF THE GAUTENG HIGH COURT

DATE: 26 November 2019

Attorneys for the Applicant: Pretoria Justice Centre

Counsel for the Applicant: S Moeng

Attorneys for the Respondent: Director of Public Prosecutions

Counsel for the Respondent: