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IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

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5 **DATE:**

6 AUGUST 2010

In the matter between:

MZUKSI TOM

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T15 **COETSEE, AJ:**

The appellant in this appeal was convicted in the Oudtshoorn Regional Court on 5 February 2010 on a charge of attempted rape in contravention of the provisions of section 55 of the Criminal Law Sexual & Related Matters Amendment Act 32 of 2007 and sentenced to seven years imprisonment. The conviction relates to the events that took place on 1 November 2008 when, on the evidence, the appellant assaulted and attempted to rape Ms Stolmeester, a 19 year old woman who was at the time walking home. The appellant pleaded not /bw /...

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guilty to the charge and disputed any involvement in the incident.

The appellant was duly convicted. The correctness of the
5 appellant's conviction is not in issue in this appeal. The
appellant appeals with leave of the trial court against his
sentence. Mr Burgers, who appeared on behalf of the
appellant, submitted that the trial court erred in exercising its
judicial discretion to sentence the appellant to seven years
10 imprisonment, in that firstly, it failed to take into consideration
the fact that the appellant had spent a period of one year and
four months in custody awaiting trial.

Secondly, that it misdirected itself in finding that the
15 appellant's record of previous convictions constituted the only
mitigating circumstances. Thirdly, that it failed to properly
consider each and every factor in determining a proper
sentence, thereby failing to exercise its sentencing discretion
properly, and fourthly, that the sentence imposed was, in all
20 the circumstances, particularly the appellant's personal
circumstances, shockingly unjust. Mr Burgers did concede that
the nature of the offence and the circumstances demanded a
lengthy term of imprisonment as an appropriate sentence.

25 These grounds of appeal and the criticisms of the trial court

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are to be evaluated. A proper reading of the judgment and sentence imposed by the trial court show that the appellant was at all times duly represented by an attorney. That the appellant's attorney was granted the opportunity to address
5 the trial court in mitigation of sentence and did so with reference of the appellant's personal circumstances, and that the trial court considered these facts adduced in mitigation by the appellant's attorney.

10 In assessing the submissions made on behalf of the appellant, it is apposite to bear in mind the dictum of Trollip, JA S v Pillay, 1977(4) SA 529 (AD) at 535 that I referred to earlier, to the effect that the mere fact that a relevant factor has not been mentioned in a judgment on sentence, does not necessarily
15 mean that it has been overlooked, as no judgment can be perfect and all embracing. A court of appeal will not readily differ with a trial court in its assessment of the factors to be had regard to and the value to be attached to them.

20 In S v Sadler 2000 (1) SACR 331 (SCA) at 334, Marais, JA quoted with approval the dictum of Nicholas, AJA in S v Shapiro 1994(1) SACR 112 (A) at 119J-120 as follows:

25 "It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the

trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes, JA in S v Rabie 1975(4) SA 855 (A) at 857D-F:

'1. In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal –

(a) should be guided by the principle that 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 and properly exercised".

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

The essential inquiry in an appeal against sentence, is not whether the sentence was right or wrong, but whether the trial court in imposing it, exercised its discretion properly and judicially. In S v Berliner 1967(2) SA 193 (A) at 200D, Van

Winsent, AJA said:

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5 "Where, however, the dictates of justice are such as clearly to make it appear that the trial court ought to have regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial court will be regarded as a misdirection on its part, entitling thi court to consider the sentence afresh."

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Not every misdirection by itself is, however, sufficient to entitle a court of appeal to interfere with sentence. It must be of such a nature, degree and seriousness that it shows directly or inferentially that the court did not exercise its discretion at all discretion at all or that it exercised it improperly and and unreasonably.

Bearing these principles in mind, I turn to consider the contentions advanced on behalf of the appellant. The record of proceedings shows that the offence was committed on 1 November 2008 and that the appellant was apprehended the same evening. On 19 January 2009 at the first appearance, it is recorded that the appellant's bail was extended. On 23 February 2009 a warrant for the appellant's arrest was issued as he failed to appear at court. Thereafter, and on 26

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February, the warrant was cancelled. The matter was remanded thereafter on a number of occasions, *inter alia* as the appellant's representative withdrew and the appellant sought legal aid, during which period the appellant's bail was
5 duly extended.

The record further records that on 20 May 2009 the appellant was held in custody on other charges and was serving a sentence of 18 months on another conviction, and that his bail
10 was once again restored. Thereafter the trial commenced on 15 October 2009. The contention that the appellant spent one year and four months, or differently put, a considerable amount of time in custody awaiting the trial in this matter and that the trial court should have taken this into consideration and failed
15 to do so, is therefore unfounded. In my view, the submission that the trial court found as a matter of fact that the only mitigating circumstances with the appellant's criminal record, is also not justified.

20 Having considered the appropriate factors in assessing a proper sentence and having recorded that the appellant's attorney addressed the Court on the appellant's personal circumstances, the influence of the liquor taken by the appellant, the fact that the appellant was for a period in
25 custody, as well as the appellant's previous convictions, the

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trial court duly considered in the appellant's favour, that the appellant's previous convictions show that the appellant never served a long term of imprisonment for violence. No facts were adduced in mitigation regarding the so called needs of
5 the appellant's child, his alleged support for his alleged extended family or his fulltime employment. In the light thereof the trial court can hardly be criticised for having erred in this regard.

10 It follows that the only basis left for the appellant is the contention that the sentence handed down is in the circumstances of the case shockingly unjust as it is put. Section 55 of the Criminal Law Amendment Act 2007 provides that any person who attempts to commits a sexual offence in
15 terms of that act, is liable on conviction to the punishment to which a person convicted of actually committing the offence, would be liable. In this regard the trial court, in my view, correctly held that the fact that the appellant's attempt to rape the complainant was not successful, cannot be credited to his
20 benefit, that the appellant failed to show any remorse and denied his involvement.

In my view a sentence of seven years imprisonment for the crime committed, does not induce a sense of shock and the
25 appeal is without merit. I propose that it be dismissed and the

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sentence of the trial court be confirmed.

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COETSEE, AJ

TRAVERSO, DJP: I agree and it is so ordered.

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TRAVERSO, DJP