REPUBLIC OF SOUTH AFICA

IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NUMBER: A353/13

(1) REPORTABLE: YES / NO

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

(3) REVISED.

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DATE SIGNATURE

In the matter between: DATE: 1/4/2014

SIBUSISO PROFESSOR MABENA **FIRST APPELLANT**

SIBUSISO BLESSION NGWENYA **SECOND APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

MOSEAMO AJ

[1] The first appellant, second appellant and a third accused were charged and were convicted in the Piet Retief Regional Court for Contravention of Section 3 of Act 32

of 2007 - rape. They were sentenced on the 26th October 2009 to life imprisonment in terms the provisions of Section 51 (1) of Act 105 of 1997. First appellant is appealing against both conviction and sentence while Second Appellant is appealing only against sentence.

[2] At the hearing of the appeal appellants' counsel conceded that the conviction of the first appellant is proper and cannot be faulted.

[3] The appelant's defence was that he did not commit any of the offences as he was not present during the commission thereof.

[4] The complainant testified that (a) first appellant, second appellant and a third accused assaulted her and dragged her away to a field; (b) she managed to escape but was aprehended again; (c) first appellant and second appellant raped her one after the other. (d) she knew the second appellant before the date of the incident.

[5] The complainant's testimony is supported by her boyfriend, Montle, who witnessed the assault and the conclusion of the rape. Montle testified that he knew the appellants before the date of the incident.

[6] The third accused testified that he observed the appellants raping the complainant whilst holding her legs.

[7] I am of the view that the first appellant was correctly convicted. Consequently the conviction against the First appellant stands to be confirmed.

SENTENCE

[8] It is trite that the only time that the court of appeal can interfere with sentence, is when the sentencing court has seriously misdirected itself or when there is such disproportion between the sentence that the appeal court considers appropriate and the one imposed by the sentencing court that it invokes a sense of shock.

[9] In the event that the appeal court finds that the trial court misdirected itself, it will interfere with the sentence. To come to a conclusion that the trial court misdirected itself, the appeal court would assess the sentence with a view to determine whether there is a stark difference between the sentence of the trial court and that which the appeal court would have imposed.

[10] Appellants were convicted in terms of s 51 of Criminal Law Amendment Act 105 of 1997. In terms of s 51(3)(a) a court which has found somebody guilty of an offence referred to in Part I of Schedule 2 or referred to in Part II of Schedule 2 shall, if it is satisfied that substantial and compelling circumstances exists which justify the imposition of a lesser sentence described in those subsections, enter those circumstances on the record of the proceedings and may thereupon impose a lesser sentence.

[11] Appellant contends that the court *a quo* neglected to consider the following substantial and compelling circumstances which justify a deviation from the prescribed sentence: (a) Although the First appellant has a previous conviction of assault while the Second appellant has no previous conviction this does not mean they have a propensity for violence (b) The appellants are not beyond rehabilitation. (c) The complainant did not suffer serious physical injuries during the rape. (d)The rape was not planned or pre-meditated. (e) The appellant consumed alcohol and it was the abuse of alcohol which contributed to the commission of the offence.

[12] It is the Respondent's sumbission that: (a) Rape is a very serious offence and prevalent in South Africa; (b) Appellants showed no remorse; (c) Psychological trauma suffered by the Complainant is likely to last longer.

[13] The court *a quo* considered personal circumstances of the appellants in passing sentence. It also noted the fact that first appellant had a previous conviction of assault. The fact that consumption of alcohol could have contributed to the commision of the offence was dimissed by the court *a quo* on the basis that 'most young boys drink just enough to get dutch courage to do what they wanted to do'.

[14] In **S v Vilakazi 2009 (1) SACR 552 SCA** the court cautioned against placing too much emphasis on the personal circumstances of an offender that the sentence imposed ends up not serving the interest of justice and that of the society.The court also indicated that:

'In the same way the interest of justice will not be served by too harsh a sentence or too lenient a sentence that it is not in synch with the crime committed.'

[15] Life imprisonment is the longest prison sentence that a court can impose and it is aimed mainly at the protection of the society. The effect of life imprisonment is to remove the offender from the society.

In **S V MABASO 2014 (1) SACR 299 KZP** the court referred to the three bench split decision in S v Nkomo 2007 (2) SACR 198 (SCA) where the imposition of life imprisonment was avoided; ' *Notwithstanding the appellant's conviction for raping his victim five times during the night, slapping, kicking and forcing her to perform oral sex on him, and holding her captive after she injured herself when she attempted to escape, the majority found that there were substantial and compelling circumstances. These circumstances were relative youthfulness of the appellant who was 29 years old; he was employed; there was a chance of rehabilitation, even though the appellant showed no remorse and no evidence was led on the prospects of rehabilitation. The majority reduced the sentence to 16 years imprisonment.'*

[16] I agree with the Respondent that rape is a serious offence which is prevalent in South Africa. The Appellants' submission that the Complainant did not suffer any serious injuries is rejected on the basis that Section 51 (3) (aA) (ii) Criminal Law Amendment Act 105 of 1997 provides that lack of physical injuries to the complainant in a rape case does not justify imposition of a lesser sentence.

[17] In this case the complainant was raped by more than one person and the complainant was under the age of 16 at the time of the rape. Appellants dragged the complainant to the field and chased her to her home after she managed to escape. They raped her while the third accused held her legs. There is no question that this kind of conduct requires a lengthy prison term.

[18] The legislature has provided for life imprisonment in circumstances such as mentioned above and it is for the court to decide whether the cicumstances of this particular case call for the departure from the prescribed sentence.

[19] In **S v Malgas 2001 (2) SA 1222 SCA** it was stated that even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court if the difference between the sentence imposed by the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as *'shocking'*, *'startling'* or *'disturbingly inapropriate'*.

[20] It was further stated in S v Malgas above that:

"The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once

a court reaches the point where unease has hardened in to a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, disproportionate to the crime, the criminal and the legitimate needs of the society."

[21] I am of the view that there is no material misdirection on the part of the court *a quo* to justify deviation from the imposed sentence.

[22] However, based on the above, I find that there is a disproportion between the sentence that the appeal court would have imposed if it were the trial court and the sentence imposed by the court *a quo*. This resulted from the court's failure to take into consideration that the fact that the appellants' are still young and can still be rehabilitated.

I would therefore make the following order:

1. The First Appellant's appeal against conviction is dismissed and conviction is confirmed.
2. The Appellants' appeal against the sentence of life imprisonment is upheld, the sentence of the court *a quo* is set aside and it is substituted by sentence of 15 years imprisonment.
3. The sentence is antedated to 26 October 2009.

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P D MOSEAMO

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree,

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N KOLLAPEN

JUDGE OF THE NORTH GAUTENG HIGH COURT

It is so ordered.