REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

APPEAL No: A562/2012

DATE: 28 MAY 2014

In the matter between:

STEVEN NDLOVU **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGEMENT

MOLOPA-SETHOSA J

[1] The appellant was charged in the North Gauteng High Court, Pretoria, on four counts of rape and four counts of robbery with aggravating circumstances.

[2] The appellant pleaded not guilty to all eight (8) counts on 25 January 2005, and exercised his right to remain silent, i.e. he did not give a plea explanation disclosing the basis of his defence.

[3] Later, on 06 June 2005, after the state had led the evidence of eight (8) witnesses, the appellant changed his plea to guilty on all eight (8) counts, and a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ("The Act"), as amended, which the court *a quo* accepted as admissions in terms of section 220 of the Act, was read into the record, and handed in at court as Exhibit E.

[4] The Appellant was subsequently convicted of three counts of rape, one count of attempted rape and four counts of robbery with aggravating circumstances on 06 June 2005.

[5] The appellant was sentenced as follows:

i. In respect of counts 1 and 2, the two taken together for purpose of sentence, to 15 years imprisonment,

ii. In respect of counts3 and 4, the two taken together for purpose of sentence, to 15 years imprisonment,

iii. In respect of counts 5 and 6, the two taken together for purpose of sentence, to 15 years imprisonment,

iv. In respect of counts 7 and 8, the two taken together for purpose of sentence, to 15 years imprisonment,

v. The sentence of 15 years in respect of counts 5 and 6 was ordered to run concurrently with the sentence imposed in counts 1 to 4.

vi. 10 years of the sentence in counts 7 and 8 was ordered to run concurrently with the sentence in counts 1 to 4.

[6] The effective sentence of the appellant is 35 years imprisonment.

[7] The appellant brought an application for leave to appeal against his sentence before the learned judge *a quo.* On 05 May 2008 the Appellant's application for leave to appeal against his sentence was dismissed by the learned trial judge.

[8] The appellant then petitioned to the Supreme Court of Appeal for leave to appeal. Leave to appeal to the full bench of this Honourable Court against the Appellant's sentence was granted by the Supreme Court of Appeal on 31 May 2011.

[9] The appellant was legally represented during the trial.

[10] The facts that led to the conviction of the appellant can briefly be summarised as follows: in respect of **count 1,** that on or about 24 February 2003 and at Eastlynn, Pretoria, the appellant wrongfully and unlawfully had sexual intercourse with one N[...] M[...] without her consent. In respect of **count 2,** that on or about 24 February 2003 and at Eastlynn, Pretoria, the appellant wrongfully and unlawfully robbed N[...] M[...] of her cell phone and R150.00 cash, by assaulting, threatening and throttling her.

[11] In respect of **count 3,** that on or about **15** March 2003 and at or near Kilnerpark, Pretoria, the appellant wrongfully and unlawfully had sexual intercourse with one S[...] R[...] M[...] without her consent. In respect of **count 4,** that on or about **15** March 2003 and at or near Kilnerpark, Pretoria, the appellant wrongfully and

unlawfully robbed S[...] R[...] M[...] of her money, cash in the amount of R20.00, by assaulting and threatening her with a knife.

[12] In respect of **count 5,** that on or about 20 March 2003 and at or near Kilnerpark, Pretoria, the appellant wrongfully and unlawfully had sexual intercourse with one D[...] C[...] without her consent. In respect of **count** 6, that on or about 20 March 2003 and at or near Kilnerpark, Pretoria, the appellant wrongfully and unlawfully robbed D[...] C[...] of her cell phone money, cash in the amount of R20.00, by assaulting and threatening her with a knife.

[13] In respect of **count 7,** that on or about 09 April 2003 and at or near Kilnerpark, Pretoria, the appellant wrongfully and unlawfully had sexual intercourse with one M[...] A[...] without her consent. In respect of **count 8,** that on or about 09 April 2003 and at or near Kilnerpark, Pretoria, the appellant wrongfully and unlawfully robbed M[...] A[...] of her cell phone, by threatening her with a knife.

[14] Basically from the allegations above, it appears that between 24 February 2003 to around 09 April 2003, the appellant would apparently rape and rob the complainants in the bushes around Pretoria suburbs during the day.

[15] Basically from the allegations above, it appears that between 24 February 2003 to around 09 April 2003, the appellant grabbed his victims [the 4 complainants above], threatened them with a knife, then took them to the bushes where he raped them; and he thereafter took their belongings, e.g. cellular phones and money.

[16] In his statement, exhibit E referred to above, the appellant admitted all the elements of the crimes he was charged with, albeit after the state had extensively led the evidence of eight (8) witnesses, including amongst others, the complainants and the doctor that examined them; and he was duly convicted of all 8 counts as charged, save that in respect of count 7 the court *a quo* only found him guilty of attempted rape, as the complainant and her witness, one D[...] M[....], had testified that the appellant was disturbed by women who saw him pulling the complainant into the bushes screaming for help, and he ran away before he could complete the act of rape.

[17] Although in his application for leave to appeal **[record, vol.3 pp224-227]** the appellant had raised issues/grounds pertaining to conviction as well, it appears on the record **[vol. 3 pp237]** that he pursued leave to appeal against his sentence only; which is the leave granted by the Supreme Court of Appeal.

[18] The grounds set out as a basis upon which he appeals against his sentence can be summarised as follows:

- that the court a quo had little or no regard to his personal circumstances; that all his personal

circumstances taken together could have qualified as substantial and compelling circumstances

• that the sentence in the court a quo is unreasonably long and induces a sense of shock, more particularly because the appellant changed his plea to guilty which shows remorse.

• that even though the court a quo took the counts together for purpose of sentence, 35 years effective term is still very long under all the circumstances which were placed on record, which also required careful consideration.

• that the court a quo failed to take into account the fact that the appellant was not in his sober senses when he committed these offences, in that he was influenced by liquor, drugs and witchcraft.

• that the court a quo failed to take into account time spent by the appellant in custody pending the finalisation of this matter.

•that the sentence imposed is not fair and does not promote the interests of society.

[19] It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where it is convincingly shown that such discretion was not judicially and properly exercised and that the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S* v *Rabie* 1975 (4) SA 855 (A); *S* v *Snyder 1982 (2) SA 694 (A); S v Sadler* 2000 (1) SACR 331 (SCA); and Director of Public Prosecutions, *KZN v P* 2006 (1) SACR 243 (SCA) para 10; S v Blignaut 2008 (1) SACR 78 (SCA) at 81f-83f.

[20] As to the nature of the misdirection which entitles a court of appeal to interfere, the following was stated in *S v Pillay* 1977 (4) SA 531 (A) at 535 E-F:

> "*Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. "*

[21] At the commencement of the trial, the appellant was duly sensitized of the applicability of s 51 of Act 105 of 1997 by the court *a quo* that upon conviction he would face sentence of 10 years imprisonment minimum on each count of rape and 15 years minimum on each count of robbery with aggravating circumstances. The warning was repeated again prior to the appellant's submission of admissions in terms of Section 220 of the Act [exhibit E], which the court *a quo* had considered in the light of the evidence already led when convicting the appellant.

[22] The trial court took into consideration the serious nature of the offences, and carefully balanced it against the appellant's personal circumstances which were placed on record by the appellant himself during his evidence in mitigation of sentence as follows:

- He was born on 1 August 1972 which made him effectively round about 33 years old at the time of sentence.

- He was born out of a family of three and he is the second born child, he was born at a place called Tweefontein, in Kwa- Ndebele.

- At the time of the commission of the offences he was staying in Mamelodi Township.

- He was employed at a butchery at the time of the commission of the offences and that he was so employed for a period of about two years before his arrest, that he was earning round about R3 500, 00 per month.

- He was married and has four children, aged 12 years, 9 years, 6 years, and 3 years respectively. His wife passed away during 2002 and at the time of the death of his wife, the youngest child, according to him, was 3 months old. The four children were attending school. He had continued to bring up his children alone, after the death of his wife. When his wife passed away, he felt very bad. The children were with his mother who was receiving old pension moneys.

- He was told that his father separated with his mother whilst he was still very young and he never saw his father and he has never been raised under the guidance of a male person.

- He attended school up to grade 9 which he has passed in 1988.

- He indicated to the court *a quo* that he committed these offences because of usage of dagga, drinking liquor and misusing drugs; further that he was bewitched.

[23] The trial court found to be aggravating the fact that

❖ The appellant committed a series of crimes which by their nature are considered especially serious and even more serious as they appeared to have been planned.

❖ The appellant targeted vulnerable woman walking alone in broad day light.

❖ A knife was used to threaten the complainants.

❖ The complainants were not only robbed of their personal belongings and but robbed of their dignity.

❖ The victim impact reports compiled by a social worker, Ms Norah Ngobeni, revealed the devastating effect that the appellant's crimes had on the lives of the complainants.

❖ The interests of the community.

[24] The trial court also took into account all the applicable principles in consideration of what is the befitting sentence in the circumstances, as articulated in *inter alia*, *Malgas vS* 2001 (3) ALL SA 220 (SCA) [2001 (2) SA 1222 (SCA)] on substantial circumstances; 5 *vZinn* 1996 (2) SA 537 (A) on balancing the crime itself with the interest of society; *Public Prosecutions Pretoria & Another* 2007 (5) SA 30 (CC) on the gravity of the offence and its prevalence and its indignity to females; S v Khumalo & another 1984 (3) SA 327 (A) on the deterrence purpose of sentence.

[25] The trial court after considering all the factors presented to it concluded that there were no substantial and compelling circumstances to depart from imposing the prescribed minimum sentence. I find no fault with this finding.

[26] Counsel for the appellant submitted on behalf of the appellant that the learned judge *a quo* did not show mercy on the appellant when he imposed an effective sentence of 35 years imprisonment; that the sentence in question was stiff and harsh in the circumstances. She however correctly conceded that on the facts before this court there was no misdirection at all on the part of the learned judge.

[27] On the other hand counsel for respondent submitted that the appellant takes no responsibility for his crimes and insists that alcohol, drugs and witchcraft are to blame for his crimes. That the prosecutor's cross-examination and the court's questions rubbished these claims during the trial; and that this was not only an indicator of lack of remorse but also an indicator that the appellant may not easily be rehabilitated. He further submitted that the court *a quo* made no misdirection in arriving at the sentence and imposed an appropriate sentence which does not warrant any interference. As already stated above counsel for the

appellant is *ad idem* with this submission that on the facts before this court it cannot be said that there was misdirection on the part of the learned judge *a quo.*

[28] I agree with both counsel that on the facts before this court it cannot be said that there was misdirection on the part of the trial court.

[29] In my view, the only aspect deserving of consideration is whether the trial court showed mercy on the appellant if regard is had to the sentence imposed, or not. The trial court clearly, despite the severe aggravation in this matter, displayed mercy on the appellant by recognising that the consecutive imposition of the applicable minimum sentences would cumulatively lead to a sentence of 60 years imprisonment; which the court held would be disproportionate to the crimes committed and accordingly made concurrency orders which resulted in an effective sentence of 35 years imprisonment.

[30] It brooks no argument that rape is inherently a serious crime which violates the right to dignity of the victim, degrades and dehumanises the victim, reducing her to a chattel for the satisfaction of the lust of the perpetrator. However, the various degrees of seriousness of such crimes must still be had regard to when imposing sentence; *refers v Mohomotsa 2002 (2) SACR 435 (SCA)* at 444 a-e.

[31] Indeed in *S v Mahomotsa supra at 443 f-h, 445 e-h,* it was held that factors such as the nature and gravity of the injuries inflicted on the rape victim, the after-effects following the ordeal should be taken into account considering in considering whether substantial and compelling circumstances are present, justifying departure from imposition of the minimum sentence.

[32] *In casu* the victim impact reports of the complainants [exhibits F, G, H and J respectively], compiled by a social worker Ms Norah Ngobeni, were placed before the court and revealed the devastating effect that the appellant's crimes had on the lives of the complainants. Ms Ngobeni also testified, and it is clear from her evidence and from these reports, exhibits F, G, H and J respectively, that the rapes adversely affected the complainants' lives. The rape impacted on their physical, emotional health, social, financial and family lives. Based on this the trial court correctly found that the crimes committed by the appellant herein affected the complainants psychologically and socially.

[33] As already stated above, the trial court, after considering all the factors presented to it, correctly in my view, concluded that there were no substantial and compelling circumstances to depart from imposing the prescribed minimum sentence. The trial court further took into account the cumulative effect of the sentence imposed and as set out above, ordered that some sentence run concurrently with the sentence in other counts. In my view the trial court showed immense mercy on the appellant.

[34] Having regard to all the conspectus of the matter, I do not find any misdirection in the manner which the

learned judge *a quo* considered sentence. There is no evidence to suggest that the sentence is vitiated by irregularity either. Equally I find nothing shockingly disproportionate in the sentence of 35 years imprisonment in the circumstances of the case.

[35] In the absence of misdirection or disproportionality, we are not entitled to interfere with the sentence. In my considered view there is no merit in the appeal on sentence.

[36] In the premises I propose the following order:

1. The appeal against sentence is dismissed.

L M MOLOPA - SETHOSA J

JUDGE OF THE HIGH COURT

I agree

M J TEFFO

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA

I agree:

D DOSIO

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

and it is so ordered