REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

CASE NO: A874/2014

In the matter between:

VUSI JOHANNES NGWEKAZI **Appellant**

And

THE STATE **Respondent**

J U D G M E N T

TEFFO. J:

[1] This is an appeal against sentence only. The appellant was arraigned in the regional court, Springs, where he faced a charge of attempted rape in contravention of section 55 of the Criminal Law Amendment Act 32 of 2007.

He pleaded not guilty but was ultimately convicted and sentenced to 8 (eight) years imprisonment. He was also declared unfit to possess a firearm.

[2] He appeals against the sentence with leave of this court having been granted on petition.

[3] The facts of this matter are briefly as follows:

On the morning of 1 April 2013 at approximately 05:30, Ms [G…….] [D……], the complainant in this matter, was accosted by the appellant on her way to work, who placed a knife on her neck and demanded to have sexual intercourse with her. She "pleaded "with him" not to proceed but he Insisted and she eventually on his orders, took off her skirt and panties. He pushed her towards the end of the passage and ordered her to lie down on her back. He then lowered his pants until his penis was visible. He could not get an erection. As a result he shouted at her. She cooperated and informed him that she would assist him to get an erection if he lay down. As he lay down, he moved the knife into his left hand. This enabled Ms [D…..] to grab the knife from him. She then stabbed him above his eye. Subsequent thereto they wrestled over the knife and she again managed to stab him at the back on his waist. The handle of the knife broke and she was only left with the blade. The appellant tried to stab her. She screamed and he pushed her against the wall, she continued to scream and cried out for help. A man and a lady appeared in the passage. The appellant fled as they were approaching them and Ms [D…….] also ran after him. She was half naked at that stage. The couple that was approaching them in the passage after hearing the screams followed suit and managed to apprehend the appellant while Ms [D……] sat down when she reached the street and was given her skirt found at the scene which she wore and covered herself. That, briefly, was the evidence on which the appellant was convicted.

[4] The following personal circumstances of the appellant were placed on record in mitigation of sentence:

That he was 42 years old at the time of the commission of the offence, he is married with three children aged 13, 9 and 6 years.

He was employed as a security guard and earned a salary of R3 500,00 per month. He was stabbed twice during the incident, once on the head and once on the waist. He was under the influence of alcohol. He holds a firearm licence and used a firearm at his work as a security guard. He was a first offender.

[5] It was argued on behalf of the appellant that the trial court did not adequately consider the factors in mitigation of sentence which related to the personal circumstances of the appellant, the submission that the appellant is a candidate for rehabilitation, that he is a first offender and that the offence was not planned. It was also pointed out that the trial court overemphasized the seriousness of the offence, the interest of society and the prevalence of the offence. A further submission was made that the sentence imposed is out of proportion with the totality of the mitigating factors, it is grossly excessive and that the magistrate did not exercise his discretion properly. It was also submitted that the declaration of the appellant's unfitness to possess a firearm is punishment on its own because the appellant was employed as a security officer at the time of the commission of the offence. Accordingly, declaring him unfit to possess a firearm would disable him from getting the same employment in the future.

[6] The state made the following submissions in aggravation of sentence: The appellant acted out of character the way he reacted. He committed a violent crime. He used a weapon to attack the complainant. The complainant bought for her life. Her integrity was attacked. She had to run to the street half naked, sat there crying

in pain, shame and humiliation and people around her told her to dress to cover herself. As a security guard the appellant was supposed to guard people against criminals and protect them but he took a weapon, went out and attacked the complainant. The complainant had shortly before the attack, buried her father. She is a breadwinner at her homestead. She wanted to protect and save her job by defending herself from the appellant as she did not want her mother to mourn for another member of her family. It was argued that the appellant could not be trusted with a dangerous weapon like a firearm in the community.

[7] The basic approach in every appeal against sentence was set out in S *v* *Rabie* **1975 (4) SA 455 (A) at 857D-F to be the following: the court hearing the appeal**

"(a) should be guided by the principle that punishment is 'preeminently 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'."

The test under (b) is whether the sentence is vitiated by any irregularity or misdirection or is disturbingly inappropriate (see also S *v Giannoulis* **1975 (4) SA 869 (A), S** *v Barnard* **2004 (1) SACR 191 (SCA) at 194C-D, S y** *Mayisela* **2013 (2) SACR 129 GNP at [13].**

[8] In S *v Ncheche* **2005 (2) SACR 386 (W) the Full Court also held that sentencing fell primarily within the discretion of the trial court and that an appeal court may only interfere where the trial court has not properly and reasonably exercised its discretion when imposing sentence. It further held that where that sentencing discretion was properly and reasonably exercised, the appeal court had no power to interfere. Within this context, the Full Court pointed out that a trial court in imposing sentence is not bound by sentences imposed by other courts, including higher courts, as long as it exercises its sentencing discretion reasonably. See S** *v Holder* **1979 (2) SA 70 (A) at 80D and** *R v Karg* **1961 (1) SA 231 (A) at 236H where the following was stated:**

*"Fourthly and finally***;** *it* **was** *contended for the appellant that SNYMAN, AJ., paid no, or no sufficient regard to the trend of judicial decisions quoted to him. It may be accepted that sometimes a succession of punishments imposed for a particular type of crime provides a useful guidance to a court dealing with such a crime. But each case should be dealt with upon its own facts, connected with the crime and the criminal, and no countenance should be given to any suggestion that a*

rule may be built up out of a series of sentences which it would be irregular for a court to depart from "

[9] The court in S *v Malgas* **2001 (1) SACR 469 (SCA) at 478E-H said the appeal court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence that the appellate court would have imposed had it been the trial court, is so marked that it can be described as** *'shocking', 'startling***or '***disturbingly inappropriate***' (see also** *Madiba v S* **[2015] JOL 33686 (SCA).**

[10] I now turn to the present appeal. The complainant in this matter was 24 years old at the time of the commission of the offence. According to the J88 the complainant was examined at the Far East Rand Hospital on the same day of the incident. She sustained a laceration to her left index finger, as well as her right ring finger. She also had abrasions on her right big toe and her left knee. She was stitched for the injuries on her hand. She did not know the appellant. The appellant was walking in front of her prior to the incident around 05:30 while she was on her way to work. At some stage he disappeared and she thought he had taken another direction. Suddenly he came out of a passage, ran across the street to her where she was walking and placed a knife on her neck. He was a first offender and a security guard. He pushed the complainant to a passage where he attempted to rape her. I agree with the state's submission that given the nature of his job, the appellant was not supposed to do what he did as members of the community like the complainant looked upon him for protection against criminals. It is common cause that he was drunk and acted out of his usual character. He also sustained injuries which were inflicted on him by the complainant when she tried to defend herself. The complainant was indeed violated and degraded by being forced to strip and watch the appellant in a semi-naked state stimulating himself. She had to run to

the street with her private parts exposed.

[11] The state submitted that there was no misdirection on the part of the court a *quo* when it imposed the sentence of 8 years and that there can be no prospects of rehabilitation as the appellant denied his involvement in the commission of the offence.

[12] I do not agree with this submission taking into account that the appellant was 42 years old at the time of the commission of the offence with no previous convictions. He was drunk. The state's evidence was that the appellant's behaviour on that day was strange. One of the state witnesses adduced evidence that he knew him to be a good person All this evidence cannot be ignored.

[13] It is common cause between the parties that alcohol played a role in the commission of the offence. The appellant has been declared unfit to possess a firearm. His chances of being employed as a security guard in the future are very slim. After considering the totality of the evidence, the circumstances of the offence, its nature and the seriousness thereof, the interests of society, the personal circumstances of the appellant and the impact of the offence on the victim, the principles of sentencing and the decisions referred to above, I am of the view that the appropriate sentence that should have been imposed under the circumstances is a sentence of 4 years imprisonment. I am persuaded that the sentence imposed by the trial court is disturbingly disproportionate with the offence committed. There is, in any event, a striking disparity between the sentence imposed by the trial court and that which this court would have imposed had it sat as a trial court. It therefore falls to be set aside.

[14] As regards the declaration of the appellant's unfitness to possess a ~~firearm~~ I ~~a~~m not inclined to accept the appellant's counsel's submission that such declaration

is punishment. The appellant had been convicted of a sexual offence. He used violence in the commission of the offence. He should have known better taking into account the nature of his job at the time, that should he engage himself in acts of violence and be found guilty thereof, there would be consequences. I cannot therefore fault the magistrate for arriving at this decision.

[15] I therefore make the following order:

15.1 The appeal against sentence is upheld and the sentence of the court *a quo* is set aside and replaced with the following sentence:

*"The accused is sentenced to 4 years imprisonment***.**

15.2 In terms of section 282 of the Criminal Procedure Act 51 of 1977 the substituted sentence is antedated to 27 May 2014, being the date on which the appellant was sentenced.

15.3 The order of the court a *quo* declaring the appellant unfit to possess a firearm is hereby confirmed.

M J TEFFO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

I agree:

T M MAKGOKA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

FOR THE APPELLANT L W RANKAPOLE

INSTRUCTED BY PRETORIA JUSTICE CENTRE

FOR THE RESPONDENT M MASHEGO

INSTRUCTED BY THE DIRECTOR OF PUBLIC PROSECUTIONS

DATE OF JUDGMENT 26 FEBRUARY 2016