



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

High Court Case No: A74/16

Lower Court Case No: BSH 57/2014

CHARL SEPTEMBER

APPELLANT

and

THE STATE

RESPONDENT

Coram: ROGERS J & MAGONA AJ

Heard: 22 APRIL 2016

Delivered: 28 APRIL 2016

JUDGMENT

ROGERS J (MAGONA AJ concurring):

[1] Together with one [AB], the appellant was charged in the court quo on three counts of assault and six counts of rape. The alleged rape victims were X, a 10-year-old girl, and her cousin Y, a 16-year-old boy. The alleged assault victims were three other children. The charges were framed on the basis that the accused were co-perpetrators of all the offences.

[2] The alleged offences were committed on 3 June 2014. At that time the appellant was 21 and AB 17. The accused were arrested the same day. On 8 April 2015 the appellant pleaded guilty on one count of vaginally raping X. AB pleaded guilty on two counts of raping X (vaginal and anal) and two counts of raping Y (both anal). The prosecutor accepted the guilty pleas and withdrew the other counts. The accused were convicted in accordance with their pleas.

[3] Probation and correctional supervision reports were obtained. The State led evidence in aggravation. The appellant and his mother gave brief evidence in mitigation as did AB and a family member. On 13 May 2015 the appellant was sentenced to life imprisonment. AB was sentenced to 15 years' imprisonment for the rapes of X and to 10 years' imprisonment for the rapes of Y, half of which was to run concurrently with the 15 years.

[4] The appellant appeals against the life imprisonment in accordance with the right conferred by s 309(1) of the Criminal Procedure Act. Ms Losch appeared on his behalf. The State was represented by Ms Erasmus.

[5] The appellant's statement in terms of s 112(2) of the Criminal Procedure Act disclosed in summary the following. On the day in question the accused were walking in the veld with their dogs when they came across X and four of her friends near a sewerage reservoir. They asked the children why they were not at school. It was clear that the children were scared of them. They told the children to walk to the river, take off their clothes and swim. The children did so. They then told the four boys to run away. The appellant ordered X to take off her panties and lie on the ground. He vaginally raped her. Although he did not use physical force to subject her to his will, it was clear that she was scared and would do anything he asked. Intercourse was not consensual. He was much bigger and stronger than her and it

appeared that she was scared of his dogs. After raping her he took his bike and rode away. He was later apprehended by the police and arrested.

[6] AB' statement regarding the preliminary events was the same as the appellant's. AB stated that as the boys were running away he told Y to stop. He proceeded to rape him twice anally. He walked back to the river and found X alone. He told her to remove her panties. He raped her vaginally and then anally.

[7] Whatever one's suspicions, the guilty pleas did not establish that the appellant and AB were co-perpetrators of the various rapes or that they acted in the furtherance of a common purpose. Although the record reflects that the appellant and AB were both convicted on count 6, being one of the vaginal rape counts, this appears to have been an oversight. Based on their pleas, one of them should have been convicted on count 6, the other on count 7. Nothing turns on this.

[8] The appellant had a prior conviction for attempted rape for which on 2 April 2012 he was sentenced to 5 years' suspended imprisonment and 18 months correctional supervision.

[9] In aggravation the State called Dr van Schalkwyk who examined X on 3 June 2014. The full extent of her injuries only appeared upon examination under anaesthesia. This revealed a perineal tear which it was necessary to treat with sutures in two layers. The clitoris, labia majora and labia minora were swollen. There were three tears and bleeding in the posterior fourchette. There was bruising and a perineal tear of the hymen. There were tears in the posterior vaginal wall. There was a perineal tear of the anus. She had abrasions on her arms and legs.

[10] Dr van Schalkwyk testified that X's vaginal injuries were almost like those suffered by a mother who has exerted too much pressure in giving birth. Although Dr van Schalkwyk was a relatively junior doctor (she started her internship in 2012), she said X's vaginal injuries were more serious than any other case she had yet encountered.

[11] X was discharged from hospital on 6 June 2014. Because of the vaginal sutures, she had to take salt baths three times a day for a number of weeks. Vaginal bleeding continued for about two weeks after her discharge. Bleeding started again more recently. Her mother testified that X complained of headaches and bladder pain and that it had been necessary to visit the day hospital almost monthly. Dr van Schalkwyk said that it might be necessary to refer her to a specialist in George.

[12] Since her discharge from hospital X has suffered nightmares. Having previously slept with siblings in another room, it was necessary for her parents to have her in their bed though by the time her mother testified X was sleeping on a separate mattress. A very full impact report was filed which supports the mother's testimony. The social worker, Ms Links, expressed the view that X had suffered deep-seated emotional damage. She was anxious, fearful and tearful. She was afraid to move around in her community and had a negative view of men. Nightmares persisted as did headaches and bladder pain. Ms Links considered that X should not be exposed to judicial proceedings, even through an intermediary, because she would alternate between tearfulness and shivering silence when asked to speak about the rape.

[13] The State also called the investigating officer, Const Louw. At the time he testified he had been with the Family, Child and Sexual Offences Unit in Beaufort-West for about three years. He said that his unit received three to five rape cases per month. X's rape was the most serious case he had yet come across.

[14] Louw had been summoned to the vicinity by colleagues who had come across the boys whom the accused had chased away. While he was with the boys, the appellant cycled across the road with nine to ten dogs. Y immediately identified the appellant who was apprehended. Louw and other colleagues then began looking for X in the area identified by the boys. She was found by one of his colleagues. At that stage she was very unsteady (*'papperig'*) and there was blood on the seat of her pants. The first thing X said to him was that *'dit was my eerste keer gewees'* (ie the first time she had had sex). When he asked her what had happened, she said, very softly, that two boys had raped her.

[15] The State also called X's class teacher, Ms Draghoender, who gave evidence about her school report for 2014 (Grade 3). This indicated a significant falling-off in her performance at the end of the second term (the tests were written in mid-June 2014), with a modest improvement in the third term. X complained of headaches and bladder pain and often had to ask to leave the classroom. She was by nature quiet but had now become completely withdrawn. She needed a lot of help with her lessons. Ms Draghoender recently recommended to the principal that X receive psychological counselling.

[16] The probation report in respect of the appellant indicated that he was one of six children. He grew up without a father figure. He left school during the course of Grade 7. He was employed occasionally as a farm worker. Apart from state grants, he was the family's only breadwinner, his mother being medically unfit for work.

[17] In his evidence in mitigation, the appellant asked for forgiveness from X's family and asked the court to show him mercy. When asked if there was anything more he wanted to say to X and the family, he said no. The appellant's mother testified that he was the oldest of five children. She asked the magistrate to show leniency. She said the appellant contributed money to the family's welfare and also helped around the house.

[18] The appellant was in custody for 11 months prior to being sentenced.

[19] Because X was 10 at the time of the rape, the court a quo was obliged in terms of s 51(1) of Act 105 of 1997 to sentence the appellant to life imprisonment unless it was satisfied that substantial and compelling circumstances existed to impose a lesser sentence.

[20] The approach to the question whether substantial and compelling circumstances exist is the one laid down in *S v Malgas* 2001 (1) SACR 469 (SCA), which has been consistently followed. In terms of that case the factors to be considered in determining whether substantial and compelling circumstances exist are all the factors traditionally taken into account in assessing an appropriate sentence, bearing in mind, however, that it is no longer 'business as usual' and that

the emphasis has shifted to the objective gravity of the crime and the need for effective sanctions. If, after considering all relevant sentencing factors, the court has not merely a sense of unease but a conviction that injustice will be done if the prescribed sentence is imposed or (to put it differently) that the prescribed sentence would be disproportionate to the crime, the criminal and the legitimate needs of society, there will be substantial and compelling circumstances requiring the court to depart from the prescribed sentence.

[21] The Supreme Court of Appeal has emphasised, however, that a trial court should not base a finding of substantial and compelling circumstances on flimsy or speculative grounds or hypotheses (see, eg *S v PB* 2011 (1) SACR 448 (SCA) paras 9-10 and the passages there quoted). In *Malgas* it was said that the lawmaker has ordained that 'ordinarily and in the absence of weighty justification' the prescribed sentence should be imposed. Unless there are 'truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts' (para 25).

[22] In determining whether an injustice would arise from the imposition of the prescribed life sentence, the customary sentencing considerations which come into play are the well-known triad comprising the offender, the offence and the interests of society. These three factors in turn require a court to bear in mind the varying purposes served by criminal punishment, namely deterrence, prevention, retribution and rehabilitation. Nevertheless, and in respect of crimes dealt with in the Act, the type of sentence to which these considerations point should not be assessed as if the Act had not been enacted. As was observed by Cameron JA in *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 25 the Act 'creates a legislative standard that weighs upon the exercise of the sentencing court's discretion', so that even where there are substantial and compelling circumstances one should expect discretionary sentences to be more severe than before.

[23] The magistrate referred to the relevant authorities dealing with sentencing under the minimum sentencing regime. He noted all the relevant circumstances of the case. He also took note of the fact that the incidence of rape was high in his area of jurisdiction, that the community was outraged by this particular crime and

that schoolchildren had held demonstrations outside the court. He considered that deterrence and retribution should be to the forefront, with prevention and rehabilitation playing a lesser role. It is clear that but for the provisions of the Child Justice Act 75 of 2008 he would have imposed a life sentence not only on the appellant but also on AB.

[24] In my view the magistrate's conclusion that there were no substantial and compelling circumstances to impose a lesser sentence cannot be faulted. A life sentence cannot be said to be disproportionate to the crime, the criminal and the legitimate needs of society. The rape was a horrific one, causing the victim serious injury and pain. It was preceded by the frightening and degrading experience of having been forced by the accused, who had dogs with them, to go to the river, take her clothes off and swim. The appellant was not a first offender in relation to sexual offences.

[25] Ms Losch submitted that the court a quo misdirected itself by failing to give sufficient weight to various factors. One of these was that the appellant was only 21 when he committed the crime. In *Director of Public Prosecutions KZN v Ngcobo & Others* [2009] 4 All SA 295 (SCA) the fact that the appellants were aged between 20 and 22 at the time of the premeditated murder was not regarded, on its own or with other factors, as constituting substantial and compelling circumstances. The court said that none of them demonstrated immaturity and that there was no evidence of peer pressure. In *S v Matyityi* 2011 (1) SACR 40 (SCA) Ponnann JA was critical of the trial judge's use of the phrase 'relative youthfulness' without any attempt at defining what exactly that meant in respect of the particular individual. The learned Judge of Appeal said that while someone under the age of 18 years could be regarded as naturally immature the same does not hold true for an adult and that a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.

[26] In the present case the evidence does not suggest that the appellant was immature to an extent that it could operate as a mitigating factor.

[27] Other factors mentioned by Ms Losch were that the appellant was a 'productive member of society', earning about R120 per day as a farm worker and contributing to his family's financial support. Factors of this kind might play some role where the sentencing court is considering whether or not to impose a significant period of direct imprisonment. In the present case, however, the appellant was on any reckoning facing a lengthy period of direct imprisonment. The factors in question thus had little role to play in the assessment of whether there were substantial and compelling circumstances to depart from the life sentence.

[28] Ms Losch pointed to the fact that the appellant had only reached Grade 7 and grew up without a father's guidance and that his poor socio-economic environment exposed him to alcohol and drugs at a young age. According to the probation and correctional supervision reports, the appellant had used dagga before the incident. While the appellant's socio-economic and domestic circumstances were far from ideal, there are unfortunately many people in this country exposed to similar environments but who do not resort to crime. There is no evidence that the use of dagga impaired the appellant's faculties at the time he perpetrated the offence.

[29] Ms Losch asked us to take into account that the appellant had pleaded guilty and shown remorse. In *S v Matyityi* supra Ponnann JA said the following (para 13, footnotes omitted):

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since

provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.’

[30] The magistrate was doubtful about the genuineness of the remorse. So am I. The probation officer’s view was that the appellant had not demonstrated real insight into the seriousness of his crime and its impact on the victim and her family; he was more worried about the legal consequences for himself and the financial effect on his family. The version of events furnished by the appellant to the probation officer bears this out. It differs materially from the plea. Among other things, the appellant said that he was persuaded by AB that the appellant had consented to sexual intercourse. The appellant’s mother told the probation officer that while in custody her son had consistently maintained his innocence. The appellant’s expression of remorse in court was perfunctory to say the least. His plea statement was also, in the circumstances, a terse document which omitted any mention of joint conduct with AB after the point where they came across the children and reprimanded them for not being at school.

[31] It is to the appellant’s credit that he pleaded guilty but this does not take him very far. The accused were arrested on 3 June 2014. They do not appear to have communicated an intention to plead guilty prior to the appearance on 8 April 2015. The State’s case against them was strong. X and Y were undoubtedly raped. The appellant was observed riding away from the scene with his dogs. Y, a 16-year-old boy, was able immediately to identify him as one of the two attackers. In all likelihood the other children could also have done so.

[32] Finally Ms Losch referred to the fact that the appellant had spent 11 months awaiting trial. This is not an unusually long time. If the appellant had pleaded guilty at an earlier stage, the period would have been shorter. There was no time-wasting by the State.

[33] Ms Losch submitted that the magistrate misdirected himself by over-emphasising the seriousness of the offence, the interests of society and the attitude of the Beaufort-West community. This misdirection was supposedly reflected in the fact that about 90% of the judgment was devoted to these matters. One should bear

in mind, though, that the bulk of the oral evidence which the magistrate heard, and which he summarised in his judgment, was evidence in aggravation. The magistrate was rightly appalled by the crime and undoubtedly impressed by the community's outrage but I do not gain the impression that he abdicated his responsibility to determine a just sentence. Balancing the relatively meagre mitigating factors against the aggravating circumstances, I am satisfied that he came to the right conclusion.

[34] The appeal is dismissed.

ROGERS J

MAGONA AJ

APPEARANCES

For Appellant

JE Losch

Chambers

Cape Town

For Respondent

E Erasmus

Office of the Director of Public Prosecutions

Western Cape