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IN THE HIGH COURT OF SOUTH AFRICA

North Gauteng High Court, Pretoria

Case No: A 22/2009

DATE:01/ 04/2010

M M.

Appellant

vs

The State

Criminal Appeal from Magistrates, Court Coram: Ledwaba J et Sapire AJ

JUDGEMENT

SAPIRE, A J:

The Appellant, who at the time of trial was aged 26 years, appeared before the Benoni Regional Court Magistrate on one count of rape involving two acts of non consensual intercourse with the complainant. He was convicted and sentenced to life imprisonment. The

sentence so imposed is a minimum sentence prescribed by Section 51 of Act 105 of 1997. It is a sentence which may not be departed from by the imposition of a lesser sentence unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The substance of the appeal is that such circumstances were present and should so have been found to exist by the magistrate. It follows so it was argued that a lesser sentence would have been appropriate, and should have been imposed.

Sections 51 and the relative Schedule of the Criminal Law Amendment Act 105 of 1997 since amendment provide:

51 Discretionary minimum sentences for certain serious offences

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.

(2) omitted not relevant...

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part i of Schedule 2. it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(AA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

- (ii) an apparent lack of physical injury to the complainant:
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.

(4)

(5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in s 297(4) of the Criminal Procedure Act 51 of 1977.

(6). (Omitted because immaterial.) (7)

(8)

The relevant portion of Schedule 2) is as follows: 'Part I

Rape -

(a) when committed -

(I) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii)

(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; or

(iv)

The offence committed by the Appellant is rape perpetrated in circumstances as described in Schedule 2, (a) (i) under Rape as the victim was penetrated by the accused twice with a short intervening interval of time. There does not appear to be any significance in that there was only one charge of rape, although completed and separate instances of the offence took place in close succession. The prescribed minimum sentence is subject to the discretion

afforded by Section 51(3) of the Act.

This discretion, (before later amendments) received the consideration of the Supreme Court of Appeal in *State vs. Malgas*, 2001 (2) SA 1222, the Headnote to which accurately encapsulating the judgment reads "Section 51 of the Criminal Law Amendment Act 105 of 1997 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2). Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. Unless there are, and can be seen to be, 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. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. All factors (other than those set out above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role: none is excluded at the outset from consideration in the sentencing process. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a

departure from the standardised response that the Legislature has ordained. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society. so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided.."

Now to apply the principles so summarised to the facts of the case before us.

Counsel for the appellant submitted that substantial and compelling circumstances as contemplated were to be found which should have entitled and persuaded the court a quo to deviate from the prescribed sentence.

The first of such circumstances he argued was that although not married the appellant was the father of two minor children, born of different mothers, to the support of whom he contributed from his earnings in gainful employment. It was not even suggested that the appellant should have been so sentenced as to enable him to continue working and contributing to the support of these children. This would have excluded any custodial sentence. On the contrary a long custodial sentence is not avoidable. By the time the Appellant has served even a lenient custodial sentence in expiation of his crime the children will have grown up without his contribution to their support. This consideration therefore, is not substantial and does not compel a departure from the prescribed minimum sentence.

Secondly counsel argued that the Appellant was a first offender, 27 years of age at the relevant time and thus a candidate to rehabilitation. This argument too, cannot be sustained. The Appellant, like the complainant was an employee of Lovelife, an organisation devoted the propagation of appropriate sexual conduct in the community especially in regard to combating HIV/AIDS. The Appellant was therefore a teacher, not himself requiring instruction for his rehabilitation. As such the Appellant was well schooled in the proprieties of sexual behaviour and aware as any, of the gravity of the crime of rape. His rehabilitation was not at the time of sentencing a primary object of the sentence which had to be imposed.

Although counsel submitted that the court a quo did not have the benefit of an expert report regarding the extent of any psychological trauma suffered by the complainant the absence of such a report does not mean that the magistrate was not aware of how seriously the complainant was affected by the repeated rape. The medical evidence indicated a serious sexual assault resulting in extensive injury to the complainants internal genital organs. Extensive black bruising which is only to be found where the assault on the organ is particularly severe was perceived by the doctor who examined the complainant. The picture emerges is that the encounter was rough, and its effect cannot be trivialised.

None of these taken separately can be said to constitute a justifiable reason for imposing a sentence less than the prescribed minimum. The magistrate examined all the submissions relative to sentence carefully and fairly. The magistrate did not record any finding of substantial and compelling circumstances in the record. It must be inferred that none were found. I am not persuaded that the magistrate was, save for what follows, in error..

Having said this, the imposition of a life sentence does not appear to be appropriate in the circumstances. The original impression in this regard has become increasingly crystallized

during the examination of the record and the attention to argument from counsel. I felt it proper to put it to counsel for the State that I had the impression that even she had misgivings in this regard. To this she agreed.

The root of the problem is that the minimum sentence prescribed for the offence of which the appellant was convicted is also the maximum sentence which since capital punishment has been eliminated; a court in this country can impose. This makes it difficult to apply the act when it is recognized that there is a gradation of seriousness even in instances where the perpetration of the offence is within the circumstances contemplated in 2(a) (i) of the schedule..

The Supreme Court of Appeal has indicated guide lines as to how the discretion is to be applied. In *S v MAHOMOTSA* 2002 (2) SACR 435 (SCA). concerned with the sentencing in a case of multiple rape such as the present. Mpati JA in delivering the judgment of the court in paragraphs 14. 18 and 19 said:

"The present being a case where the complainants were each raped more than once, the prescribed period of imprisonment for life is the sentence which should ordinarily be imposed. It should not be departed from lightly and for flimsy reasons which cannot withstand scrutiny (*S v Malgas*: *S v Dodo* 2001 (1) SACR 594 (CC) (2001 (3) SA 382)). However, in considering the question, a Court is not prohibited by the Act from weighing all the usual considerations traditionally relevant to sentence."

18 It perhaps requires to be stressed that what emerges clearly from the decisions in *Malgas* and *Dodo* is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape

delineated in the Act. a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial Court, subject of course to the obligation cast upon it by the Act to take due cognisance of the Legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past. Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and. subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in *S v Abrahams* 2002 (1) SACR 116 (SCA). 'some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust' This caveat was added.

19. Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the

imposition of the maximum penalty." S v GN 2010 (1) SACR 93 (T) is a recent decision of the full bench of this court in point, which followed the guide line to which I refer. The headnote reads as follows

"In S v Mahomotsa and also in S v Nkomo the courts relied on the passage from S v Abrahams that I have quoted earlier. I have already concluded that the passage does not mean that, even where the Act prescribes imprisonment for life as a minimum sentence, it can be imposed only in the most serious cases. In my view the quoted passage, and its application in the other two cases referred to. conveys that, even where imprisonment for life is prescribed as a minimum sentence, a court must bear in mind that it is the ultimate penalty that the courts in this county can impose. As such, it must not be imposed lightly, even when it is a prescribed minimum sentence. At the risk of complicating it. I shall expand on what I have said in the previous paragraph. It is axiomatic that, in order for it to arrive at a just sentence, a court must have a balanced regard to the nature and seriousness of the crime, the personal circumstances of the accused and the legitimate interests of society. The result thereof is that justice demands that, even for similar crimes, different sentences must often be imposed. In S v Malgas (Para 25) Marais J A pointed out that s 51 of the Act 'has limited but not eliminated the courts' discretion in imposing sentence '. It follows that, even where the Act prescribes a minimum sentence, the courts must still seek to differentiate between sentences in accordance with the dictates of justice. Where the prescribed minimum sentence is less than life imprisonment, such differentiation is possible either by imposing a heavier sentence than the prescribed minimum or. where there are substantial and compelling circumstances so to do. to impose a lesser sentence. Where the minimum prescribed sentence is life imprisonment, it is impossible to differentiate otherwise than by imposing a lesser sentence. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must also be taken into account. Accordingly, in its quest to do justice, a

court will more readily impose a lesser sentence where the prescribed minimum sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment."

This being so the inappropriateness of the sentence itself can in terms of the judgement in Malgas case amount to a compelling circumstance justifying a deviation from the minimum prescribed sentence. This is a case which is undoubtedly very serious but it is not one where worse circumstances cannot be conceived.

In view of this it is open to this court to find that the Regional Court erred in imposing the prescribed minimum sentence without giving sufficient consideration to the guidelines emerging from the judgments to which reference has been made.

There are features of the present case which permit the finding of the existence of substantial and compelling circumstances as interpreted in accordance with precedent afforded by the cases cited. The circumstances are

a) The repeat rape although increasing the gravity of the offence of which the Appellant was found guilty to one where the prescribed minimum applies, did not so aggravate the first rape to the extent that just punishment required the imposition of the maximum sentence which the law allows. At the time of the second instance, which followed closely on the first, much of the damage had already been done. The shock injury and humiliation already inflicted on the complainant still persisted. The perpetration of the first rape required the imposition of at least the minimum sentence prescribed therefore. The repeat was related so closely in time to the first instance so that the aggravation of the persisting hurt cannot be measured. Justice

requires that the Appellant be punished for a single rape with aggravating circumstances requiring a sentence markedly in excess of the minimum prescribed.

b) It is also permissible and required to take into account the apologetic attitude shown by the appellant immediately after the commission of the crime. Although much of the mitigating effect thereof was dissipated by the Appellants eventual plea of not guilty and the defence proffered that the intercourse with the complainant was with her consent, the evidence is that the Appellant by apologising and confessing to the nursing sister tried to mollify the complainant and offered to recompense her for the hurt he had caused her. No doubt he also was trying to forestall the laying of the charge against him. Nonetheless his initial remorse can operate in his favour. I propose the following order:

The appeal against the sentence is upheld on the basis that the sentence of life imprisonment imposed by the court a quo is set aside and substituted with the following sentence.

"Appellant is sentenced to 15 (fifteen) years imprisonment which is antedated to the 24th of June 2008.

SAPIRE, A J

I AGREE and it is so ordered:

IT

LEDWABA, J