

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: **A86/2022**

Reportable:
Of Interest to other Judges:
Circulate to Magistrates

In the Appeal of:

ZACHARIA EZEKIEL MOSHE

Appellant

and

THE STATE

Respondent

CORAM:

REINDERS J et BOONZAAIER AJ

HEARD ON:

3 OCTOBER 2022

DRAFT JUDGMENT BY:

BOONZAAIER AJ

DELIVERED ON:

18 OCTOBER 2022

A. INTRODUCTION

[1] The Appellant was convicted in the Brantford Regional Court on one count of rape in terms of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related matters) 32 of 2007 read with the provisions of sec 51(1) of the Criminal Law Amendment Act, 105 of 1997.

[2] The Appellant was sentenced to life imprisonment.¹

[3] The Appellant appeals his sentence of life imprisonment by virtue of the automatic right of appeal he enjoys.²

[4] The Appellant's grounds of appeal against his conviction are that the court *a quo* erred in finding that his guilt was proved beyond reasonable doubt. It is the Appellant's case that it is trite law that then onus rests on the State to prove his guilt beyond a reasonable doubt. If the Appellant's version is reasonably possibly true he is entitled to his acquittal.

[5] The Appellant's grounds of appeal against his sentence are that, the Regional Court's sentence for a first offender was too harsh. The finding that there were no substantial and compelling circumstances in the matter and did not justify the imposition of a lesser sentence than life imprisonment, is contested. The argument is that the sentence was inappropriate considering the mitigating factors. The court did not take into account his personal circumstances. Thus, the issue before us is whether there were mitigating factors to be considered, more specifically substantial and compelling circumstances justifying a lighter sentence. Counsel for Appellant conceded that he perused the Record and could not find any substantial or compelling factors to enable this court to deviate from the prescribed minimum sentence of life imprisonment.

[6] In deciding whether the sentence warrants our interference it should be considered that this court's power to alter sentences is limited as the infliction of punishment lies in the discretion of the sentencing court. A court of appeal may not

2. As defined in section 51(1) of the Criminal Law Amendment Act of Act 105 of 1997.

3. Provided in section 309(1)(a) of the Criminal Procedure Act, Act 51 of 1977 ("the Criminal Procedure Act").

simply substitute a sentence because it prefers to do so. This court will be entitled to interfere only if the sentencing court materially misdirected itself or the disparity between its sentence and the one which this court would have imposed, had it been the trial court is 'shocking', 'startling' or 'disturbingly inappropriate'.³

B. MINIMUM SENTENCE LEGISLATION

[7] The charges are subject to the minimum sentencing provisions of the Criminal Law (Sentencing) Amendment Act 38 of 2007, relating to a minimum sentence of life imprisonment.

[8] In considering the minimum sentences prescribed for the purposes of sentencing it is, of course, necessary to have regard to all the factors relevant to both aggravation and mitigation of sentence. In particular, in matters such as this where the State seeks the minimum sentence provided in Act 105 of 1997, and to put all the relevant factors into a melting pot, to determine whether life imprisonment would be a sentence which accords with and is a just sentence, having regard to the crime, the accused and the public interests. Taking into account all aggravating circumstances as well as the relevant mitigating factors and circumstances.

[9] A Court may only impose a lesser sentence if satisfied that there are substantial and compelling circumstances which justify same (section 51(3)(a)).

C. SUMMARY OF THE FACTS:

[10] The State alleged that on 21 January 2017 and or near Brandfort, the Appellant unlawfully and intentionally commit an act of multiple sexual penetration with the complainant, a 25 -year old girl.

[11] The salient facts of the matters are as follows:

The complainant was a sole witness and testified that on the said date, a Saturday she had attended a funeral in Brandfort from her hometown, Bultfontein. On her way

³ S v Malgas 2001 (1) SACR 469 (SCA) para [12]

back, because the taxi in which she was travelling was overloaded, she had to be off-loaded on the freeway, of the highway. At the same time the Appellant, also alighted from his own taxi. She had known the accused from Bultfontein for about three months prior to the incident, because they were both stranded, they set about looking for lifts. At a stage when they were walking the Appellant informed her that he was going to rape her. He grabbed her bag and assaulted her with a chain that formed part of the handle of the bag. She then fled to a truck and clung to the handle trying to seek help. This truck was driving towards Brandfort. She fell off the truck and injured herself and the driver drove off. After she had fallen, she was disorientated, the Appellant was at that point upon her and pulled her towards the bushes a few meters from the road where he had sexual intercourse with her, without her consent. From there they moved onto the road and she was again dragged off the road to the bushes where the accused had sexual intercourse with her for the second time, without her consent. After the second encounter she ran onto the road and stopped a motor vehicle driven by a stranger. She got a lift from this vehicle and left the Appellant behind. She was adamant that the sexual intercourse was without her consent. She testified it was more than once, she does not know how many times but it was several times.

[12] She was later taken for a medical examination. The J88 was not disputed. The complainant verbalized to Dr. Ciba that she was overpowered and dragged to the crime scene. He noted that she was emotionally disturbed and crying on -and-off. His conclusion was that she sustained multiple injuries and his clinical findings supported her vaginal injuries.

[13] The Appellant later testified in his own defense and confirmed what the Complainant testified, that they came from a funeral and that they have found themselves together on the highway after both alighted from their taxis, they had been travelling in. They both set out looking for lifts and that the complainant at some point without explanation tried to mount a truck. The Appellant further testified that after complainant had fallen from the truck, he assisted her and proposed love to her. She agreed to have sexual intercourse with him. They walked to a spot a distance from the highway where they had consented intercourse. They returned to the same place where they previously had been waiting for lifts on the highway. At

that stage Complainant indicated to him that she would like another round of sexual intercourse with him. They had consented intercourse for the second time. Thereafter they went back to look for lifts. They both stopped the Citi Golf. The Appellant paid the travelling fee but he had a misunderstanding with the driver after the driver detected the injuries the complainant has sustained. That was the reason why she left alone with the driver. The Appellant testified that they were both drunk. He also denied that the complainant was assaulted or that she sustained severe injuries on her leg.

[14] The Appellant's explanation why the Complainant laid a charge against him is that because she might have encountered a fight with her boyfriend.

[15] The following is undisputed:

- i) that the Appellant and complainant knew each other before the incident.
- ii) that they both attended a funeral in Brandfort and on their return to Bultfontein were waiting for a lift next to the highway.
- iii) sexual intercourse took place on two occasions.
- iv) that the complainant sustained injuries as per J88.

[16] The Appellant pleaded not guilty to the charge and gave no plea explanation.

D. THE GROUNDS OF APPEAL

[17] The appeal against Appellant's conviction is based on the fact that the Court *a quo* erred in finding that his guilt was proved beyond reasonable doubt.

[18] The Complainant was a single witness and the cautionary rule needs to be applied. Counsel for Appellant submitted that the court *a quo* also did not account for all the evidence which affected the credibility and reliability thereof. The court *a quo*

found the complainant to be credible and that she stuck to her version. The evidence should however not only be honest (credible) but reliable too.

[19] It was argued that the Court *a quo* should have taken cognizance of the following:

- i) all the evidence which affected the credibility and reliability of the complainant's evidence. It should not only be credible but reliable too,
- ii) Complainant's testimony with regards to the truck which appeared and the subsequent assault and rape was not consistent with her explanation under cross examination.
- iii) She gave inconsistent evidence with regards to her tights and the number of times she was raped.

[20] It was submitted by Counsel for Appellant that *"It is trite that there is no obligation upon an accused person, where the state bears the onus, "to convince the court ". If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believe him is not the test."*

[21] The appeal against Appellant's sentence, is based on the court *a quo*'s sentence being too harsh for a first offender. It was submitted that the court should have taken into account:

- i) the fact that the Appellant was a first-time offender;
- ii) the time the Appellant was incarcerated awaiting trial.⁴

⁴ S v Brophy and another, 2007(2) SACR 56 (W).

- iii) the personal circumstances of the Appellant

E. AGGRAVATING CIRCUMSTANCES

[22] It was conceded that the offence is of very serious nature. The Respondent argued that the prevalence of the offence needs to be taken into account. The negative and long-term impact on the Complainant's is evident from her testimony. The Appellant showed no remorse.

[23] Against these aggravating factors, the court *a quo* weighed the Appellant's personal circumstances – that he was a first offender at the age of 29 years and had education to grade 10; that he was unmarried and had a child. His parents look after this child, that he was in steady employment in the construction industry and earning a salary of R 2000 a month to provide for his dependants and had been in custody for 21 (twenty- one) months before his sentence. A second, and perhaps more important factor which the sentencing court took into consideration is the all-important factor of remorse. Appellant, confirmed he does not have any remorse.

[24] Evidence of the true extent of the mental and psychological harm and scarring sustained by the complainants were led. Such evidence is not only highly relevant for the sentencing process but also valuable. It is clear that in these two instances, the complainant was seriously hurt and traumatized.

F. MITIGATING FACTORS

[25] The court *a quo* took into account that the Appellant was in custody for more than a year.

G. REMORSE

[26] *In casu* the importance of remorse, or the absence thereof, is to establish the Appellant's propensity for rehabilitation to which an acceptance that he acted in error and had a conscience is most important. Absent such acceptance, the prospects of the crime being successfully addressed and rehabilitation established are lessened. This is relevant to an assessment of mitigation (not aggravation) of

sentence. In this matter Appellant expressed no remorse whatsoever and gave no explanation, failing to take the Court into his confidence.

H DISCUSSION

[27] More recently, in *S v Vilakazi*⁵ the court explained that particular factors, whether aggravating or mitigating, should not be taken into account individually and in isolation as substantial or compelling circumstances. Nugent JA said (para 15):

“It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.”

[28] At para [21], Nugent JA further stated:

“The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound.”

[29] In *S v Malgas supra* the Court held:

“(12) The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers

⁵ 2012 (6) SA 353; 2009 (1) SACR 552 (SCA).

to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...”

[30] I am mindful of the view of Judge Brand JA expressed in *S v Monageng*:⁶

“Lest there be any misunderstanding, let me make myself clear. I believe that our courts are duty-bound to do everything in their power to protect the vulnerable sections of the community who fall prey to sexually inappropriate behavior. I therefore share the view of those who believe that rapists, and particularly rapists of young children, should be punished severely.”

[31] It is clear that the complainant, after the trauma and all other unpleasant and humiliating experiences a rape victim has to undergo, could not come to terms with the rape.

[32] The complainant is suffering an ongoing emotional distress. Her friends are teasing her.

[33] This, to my mind, is a factor to be considered in the overall assessment of an appropriate sentence.

[34] As the sentencing court found, there are serious aggravating circumstances present in the case. The appalling and outrageous crime committed by the Appellant was known to the Complainant and that he inflicted serious injuries to her. She testified she decided to join him to seek a lift because they are from the same hometown. She was a person whom one would expect he had a duty to protect. In addition to the trauma which a rape victim necessarily suffers from the brutal invasion of her privacy, she had to flee from him to get away.

⁶ (590/06) [2008] ZASCA 129, 2009 1 ALL SA 237 (SCA) (1 October 2008).

[34] There is no evidence to the effect that the Rape was premeditated, which could have been a mitigating factor but would not *in casu* made a difference in the sentence.

[35] This is so, even if an accused had not presented any evidence as such, as the Court must look at all the evidence holistically to determine mitigating circumstances.⁷

[36] The Appellant has chosen a soft target who could not defend herself with the cruel consequence that she will be scarred for the rest of her life. Although the complainant did suffer physical injuries, the State proved severe emotional pain on the part of the complainant. In my view emotional pain is far worse than physical in that the emotional scars last a lifetime.

[37] The above approach was further emphasized in DPP, North Gauteng v

Thabe the:⁸

“Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right- thinking and self – respecting members of society.”

[38] Judge Mpati in Monageng *supra*:

“I must, from the outset, associate myself with the views expressed by Nugent JA in Bongani Phillip Vilakazi v The State Supra that rape

*‘is a repulsive crime’, ‘an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity’.*⁹ As such,

⁷ S v Felix and another 1980(4) SA 604(A)409D-F.

⁸ All SA (2) SACR 567(SCA) at page 577G-I.

persons who make themselves guilty of it must be punished accordingly. Courts are therefore expected to give effect to the legislative intent as expressed in the minimum sentencing provisions of the Criminal Law Amendment Act and should not proceed as if it was 'business as usual'."

[39] I am mindful of the court's view in *Mabuza v S*:¹⁰

"(9) The court was however to bear in mind that the reason for the prescribed minimum sentence is deterrence and it can therefore not simply have regard to previous sentences in comparable cases....."

(13) Life imprisonment is the harshest punishment which courts can impose on an offender."

[40] The material consideration is whether the Appellant can be expected to offend again. While that can never be confidently predicted, his circumstances might assist in making at least some form of assessment. That is where remorse or the absence thereof plays a vital role.

I. TIME AWAITING TRIAL

[41] This court was requested to deal with how courts treat a lengthy period in custody prior to sentencing where the minimum sentencing provisions of section 51 of the CLAA apply.¹¹

[42] The *court a quo* did not specifically refer to the fact that the Appellant had been held in custody for a period of 21 months prior to sentencing, but on an overall assessment concluded that there were no substantial and compelling circumstances justifying a lesser sentence. The aforesaid assessment suffices in my opinion.¹²

⁹ At para 1. See too *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) 345A-B.

¹⁰ (A 348/2015) [2016] ZAGPPHC 334 March 2016).

¹¹ The period in custody prior to sentencing was referred to as 'pre-sentence detention' (*S v Radebe* and another 2013 (2) SACR 165 (SCA) at [13]).

¹² *S v Lucas* (CC72/209[2022] ZAGPPHC 346(13 May 2022).

J. CONCLUSION

[43] The learned trial Magistrate correctly analyzed and applied the remaining factors relevant to aggravation and mitigation (excluding the intoxication issue), as well as the Appellant's personal circumstances.

[44] This was a violent and abhorrent crime upon a 25-year-old girl, which has had, and will still have devastating lifelong psychological consequences.

[45] I agree with the statement of JA Curlewis in *S v Monaheng* that Legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the offence committed by the Appellant and the courts' obligation to respect and not pay mere lip service to that view.

[46] As to the propriety of the sentence imposed, I do not agree that it is so harsh that it ought to be ameliorated by this court. In my view, the sentencing court properly considered the gravity and prevalence of rape, the interests of the community, particularly its demand for heavy sentences for rapists, and the Appellant's personal circumstances which, as indicated above, it found sufficiently weighty to warrant reduction of the mandated sentence of life imprisonment.

[47] Hence, I am not persuaded that the sentencing court misdirected itself in any significant respect. In my view, the learned Magistrate correctly emphasized the abhorrent crime and its dreadful consequences for the complainant *in casu*, taking into account Appellant's personal mitigating factors.

K. ORDER

[48] Accordingly I make the following order:

The appeal against the conviction and sentence is dismissed.

A.S. BOONZAAIER, AJ

I concur.

C. REINDERS, J

On behalf of Appellant : Adv JD Reyneke
Instructed by : Legal Aid SA
Bloemfontein

On behalf of Respondent : Adv BG Claassen
Instructed by : DPP
Bloemfontein