

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. CA&R 198/2021

In the matter between:

THEMBELANI NTANTISO

Appellant

and

THE STATE

First Respondent

APPEAL JUDGMENT

RUGUNANAN, J

[1] At issue in this appeal is the sentence of life imprisonment imposed on the appellant in the regional court, Gqeberha on 17 August 2021 following his conviction on a charge of rape for contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997. The appeal lies in terms of the automatic right conferred by section 309(1)(a) of the Criminal Procedure Act 51 of 1977.

[2] Relevant for present purposes, section 51(1) of the Criminal Law Amendment Act provides as follows:

“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 I of Schedule 2 to imprisonment for life.”

[3] Under the category of “*Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007*”, Part 1 of Schedule 2 makes provision for conditions:

(a) ...

(b) *where the victim-*

(i) ...

(iA) *is an older person as defined in section 1 of the Older Persons Act, 2006 (Act 13 of 2006);*

(ii) ...

(iii) ...

(c) *involving the infliction of grievous bodily harm.*

[4] An older person is defined in section 1 of the Older Persons Act as a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older.

[5] The charge against the appellant alleged that he committed the offence of rape on 27 October 2018 and was predicated on the applicability of section 51(1). In addition, the charge stipulated that it be “*read with the Older Person (sic) Act 13 of 2006*”. Furthermore, it included an allegation that “*the rape was accompanied by the infliction of grievous bodily harm and robbery*”.

[6] Robbery is not a component of Part 1(c) of the applicable schedule. In point, a reading of section 51(1) together with the relevant part of the applicable schedule indicates that the mandatory sentence of life imprisonment would be competent in

circumstances where the rape of the victim involved the infliction of grievous bodily harm, and/or where the victim is an older person.

[7] The evidence adduced by the state did not establish that the rape of the victim involved the infliction of grievous bodily harm. To the contrary, it indicated that the infliction of grievous bodily harm occurred during the robbery. Although the condition in Part I(c) of the relevant schedule was not proven it was not disputed that the complainant was 62 years of age at the time of the commission of the offence which meant that she is an older person as defined in section 1 of the Older Person's Act. The evidence therefore established the condition in Part I (b)(iA) of the applicable schedule. On this basis the magistrate found that section 51(1) was applicable which rendered the mandatory sentence of life imprisonment competent, and having determined that there were no substantial and compelling circumstances favouring the appellant, the prescribed sentence ensued.

[8] On appeal it was contended for the appellant that:

(i) His fair-trial right underpinned by section 35(3)(a) of the Constitution was infringed at the sentencing stage by the magistrate's invocation of Part I (b)(iA) where the state's intention to rely thereon was omitted in the charge and not pertinently brought to the attention of the appellant at the outset of the trial, and

(ii) The magistrate erred in finding that there were no substantial and compelling circumstances justifying a deviation from the mandatory sentence.

[9] To begin with, it is desirable that a charge refers to the relevant penal provision of the minimum sentence legislation – but this is not an absolute rule - and each case must be judged on its particular facts.¹ Applied to the present context, pertinent reference in the charge to the provisions of section 51(1) read with Part I (b)(iA) of Schedule 2 of the Criminal Law Amendment Act, although desirable, is not an absolute rule. With reference to the section itself, the question of a breach of an

¹ S v MT 2018 (2) SACR 592 (CC) at paragraph [40]

accused's fair-trial right involves a fact based enquiry for which any conclusion, as may be arrived at, requires a vigilant examination of all the relevant circumstances.²

[10] In this case the state's intention to rely on and invoke the minimum sentencing provisions was clearly recited and conveyed at the outset. The charge expressly recorded that the appellant was charged with the offence of rape, read together with the provisions of section 51(1) of the Criminal Law Amendment Act and the Older Persons Act. Moreover, the possibility of life imprisonment was brought to the appellant's attention by the magistrate with the appellant indicating that he understood. The appellant pleaded not guilty to the charge. He fully participated in the trial in which the complainant testified as to her age and the circumstances in which the offence was committed, but maintained his innocence notwithstanding the overwhelming forensic evidence against him. I am satisfied that the appellant, who was legally represented throughout the trial proceedings, well knew of the charge he had to meet, that he comprehended the evidence led by the state, and that he knew that the state sought reliance on the applicable minimum-sentencing regime created in the relevant legislation.

[11] In the circumstances the omission complained of did not vitiate the proceedings *a quo*.

[12] On sentence, the magistrate considered the appellant's personal circumstances. He was 33 years of age at the time of the trial. He has a previous conviction for rape, is unmarried and has no dependant children. He was raised in a poor environment and resided with his father. He has a Grade 6 level of education and was in custody awaiting trial since December 2019. However, the magistrate correctly found that there were aggravating factors, namely; the complaint's age, that she was alone in the privacy of her home, that she was vulnerable and defenceless, and was hiding in a closet when her house had been broken into.

[13] She was also threatened with a knife, assaulted with fists, raped without a condom by the appellant who was young enough to have been her own son, and

² *S v Ndlovu* 2003 (1) SACR 331 (SCA) at paragraph [12] and *S v Mashinini and Another* 2012 (1) SACR 604 (SCA) at paragraph [51]

was in a visibly traumatised state by the time the police had arrived. The magistrate noted that the appellant had shown no sign of any remorse and despite being linked to the commission of the offence through DNA evidence, his persistence in maintaining his innocence rendered him unworthy of rehabilitation.

[14] For the appellant it was contended that his personal circumstances (save for his previous conviction) are favourable in lending weight to the existence of substantial and compelling circumstances. There is nothing exceptional about his personal circumstances. Cumulatively the aggravating factors far outweigh the mitigating factors. To hold otherwise to the extent that a departure from the prescribed sentence is warranted, would be to do so for flimsy reasons.

[15] Cognisant of the current levels of violent crimes perpetrated against women, the magistrate's judgment indicates that he properly considered all factors in mitigation and in aggravation before arriving at a just sentence. On the facts, the sentence imposed serves to accentuate the elements of retribution and deterrence as adequately serving the interests of society.

[16] Accordingly, the magistrate cannot be said to have misdirected himself in his approach on sentence. Appellate interference is thus unwarranted.

[17] In the circumstances the appeal against sentence is without merit.

[18] The following order will issue:

(i) The appeal is dismissed.

(ii) The sentence of life imprisonment imposed upon the appellant on 17 August 2021 in Case Number PERC 48/2020 is confirmed.

S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree.

R. W. N. BROOKS

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant:

D. P. Geldenhuys

Instructed by Legal Aid South Africa

Makhanda

For the Respondent:

M. M. Van Rooyen

Instructed by The Office of the National Director
of Public Prosecutions

Makhanda

Date heard:

04 May 2022

Date Delivered:

10 May 2022