



IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

Case No: CA&R 89/21

In the matter between:

VUYOLWETHU SDLAKELA RODE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

NQUMSE AJ:

[1] The appellant was convicted and sentenced to life imprisonment in the Regional Court, Mount Frere on one count of rape in contravention of Section 3 read with Section 1, 56(1), 57, 58, 59 and 61 of Act 32 of 2007, also read with Section 256 and 261 of the Criminal Procedure Act 51 of 1977, read with Section 51(1) of the Criminal Law Amendment Act 105 of 1977 (CLAA) as amended.

[2] According to the evidence, the complainant, a 14-year-old girl, was coming from the shop when she encountered the accused who, after he had tripped her and she had fallen, undressed her and raped her per vaginum.

[3] The medical evidence in the form of a J88 Medico-legal report was handed into evidence by agreement. DNA results from the swabs taken from the victim which matched the DNA results from the samples taken from the accused were also handed into court by agreement.

[4] In its evaluation of the evidence, the court rejected the version of the appellant, that he was in a love relationship with the victim at the time of the sexual encounter. Consequently, the accused was convicted and sentenced as indicated above.

[5] Aggrieved by the sentence imposed the appellant launched this appeal against sentence only.

[6] I now turn to deal with the issue of the sentence that was imposed. This court can only interfere with a 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 Sv Malgas* 2001(1) SACR 469 (SCA)). In *S v Rabie*¹, Holmes JA enunciated the principle as follows:

‘In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal –

- (a) Should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and
- (b) Should be careful not to erode such discretion...’

[7] The personal circumstances of the appellant were submitted from the bar as the following. He is 20 years old and an orphan since both his parents are deceased. He is unmarried with a two-year-old child who resides with her mother. He was a 19-year-old scholar doing grade 11 at the time of the commission of the offence. He has two siblings, one of whom supports him financially.

[8] During argument before us, Mr Njisane for the appellant emphasized the fact that the appellant was 19 years old when he committed the offence and therefore his youthfulness makes him a candidate for rehabilitation. He referred us to *S v Nkomo*² where the following was stated:

‘But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused’s moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be

¹ 1975 (4) SA 855 (AD)

² 2007(2) SACR 98 (SCA) paras 3 and 4

exceptional. The court below did not consider the mitigating factors adduced by the appellant to constitute substantial and compelling circumstances. In that respect it erred.’

He further took issue with the fact that the learned magistrate appears to have placed more emphasis on the trauma that may have been suffered by the victim, in the absence of a victim impact report, thereby disregarding other factors that play a role in the sentencing regime.

[9] On the other hand, Ms Trietsch, counsel for the respondent, submitted that the appellant has failed to show substantial and compelling circumstances that warrant a deviation from the prescribed minimum sentence of life imprisonment. She referred to the victim’s long lasting trauma scars, and she bemoaned the appellant’s lack of remorse as further support for the contention that the appellant is deserving of the ultimate sentence of life imprisonment.

[10] According to s 51(1) of the Criminal Law Amendment Act mentioned above, the accused is liable to a discretionary minimum sentence of life imprisonment, since the victim was under the age of 16 years when she was raped. However, if the court is of the view that an appropriate sentence to impose is a sentence less than that which has been prescribed, it is entitled to do so only if it is satisfied that substantial and compelling circumstances exist which justify the departure from imposing the minimum sentence³. A question that always confronts the court in dealing with sentence under the prescribed minimum sentence legislation is whether substantial and compelling circumstances exist.

³ Section 51(3) of the Criminal Law Amendment Act 105 of 1997

[11] An instructive approach in the application of the provisions of the CLAA in relation to the mandatory minimum sentencing regime was formulated in *Malgas supra* by Marais JA wherein the learned judge stated that the court's discretion in imposing sentence has been limited and not eliminated. The usual factors that a trial court would take into account when sentencing are still applicable, such as proportionality of the sentence to the crime, balancing the various competing interests, and the nature of the offence.⁴ The approach in *Malgas* finds expression in *S v Vilakazi*⁵ and *S v Matyityi*⁶. In *Vilakazi* the court explained that particular factors, whether aggravating or mitigating, should not be taken individually and in isolation as substantial and compelling circumstances, but ought to be viewed cumulatively. In paragraph 14 Nugent JA set out the criteria on how a court should approach the imposition of sentence when minimum sentence legislation applies as follows:

'It is clear from the terms in which the text 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. The Constitutional Court made it clear that what is meant by the "offence" in that context ... consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.'

⁴ Paragraph 25

⁵ 2009(1) SACR 552 (SCA) at para 15

⁶ 2011(1) SACR 40 (SCA)

[12] The court below found no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment. Whilst the learned magistrate referred to *S v Zinn*⁷ as his point of departure in determining an appropriate sentence, a careful reading of his reasoning according to the record reveals that he was more inclined to consider and to emphasize the effect and the impact the crime has had on the victim and paid little regard if any, on the personal circumstances of the accused. Any factor relating to the accused appears to have been viewed with scepticism. By way of example, when reference was made to the schooling of the accused at the time of the commission of the offence, the learned magistrate expressed himself as follows:

‘Afterall if the fact that you are school for instance raping the complainant, a 14-year-old is not part of the school programme. It is not part of the school curriculum so you cannot justify (sic). She is not part of a school project so it cannot then be used as a bargaining tool as a factor that the Court should look into.’

Regarding the accused’s youthfulness, the learned magistrate had this to say:

‘That is then your conduct in general then as this aspect, then when you invoke your youthfulness then that youthfulness originates to nothingness. Quite frankly I doubt that you are the age that you have mentioned. You look quite older than age that you have mentioned. Your conduct also serves to also strengthen this Court’s view that you have lowered your age for your own personal reason (sic). A young person does not behave in the manner that you do.’

⁷ 1969 (2) SA 537 (A)

[13] Undoubtedly, rape is a very serious offence. In *S v Chapman*⁸ it was described as ‘a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim’. Our courts are very much alive to the devastating effect that rape may have on a victim. In *S v C*⁹ it was described thus:

“A rapist does not murder his victim - he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life - a fate often worse than loss of life.’

[14] The magistrate was heavily criticised by the appellant for, in the absence of a victim impact report, having placed much reliance on the post-traumatic stress that the victim was bound to suffer. In my view this criticism is not entirely justified if regard is had to what was said in *Notou v S*¹⁰ where the following comment is made:

‘... No evidence was led on the effect the rape had on her. The lack of such evidence should not and cannot be construed as absence of post-traumatic stress at all. It would be unrealistic to think there was none.’¹¹

[15] It is by no means suggested that it is not of critical importance for the court to be favoured with a victim impact report. It is always useful and helpful where available for proper evaluation of the impact the crime has had on the victim and it should be encouraged. However, its absence does not mean that the court cannot take cognisance of the impact the crime has had on the victim.

⁸ 1997 (3) SA 341 (SCA) at 344 I-J

⁹ 1996(2) SACR 181 at 186d

¹⁰ 2014(1) SACR 198 (SCA)

¹¹ Ibid paragraph 12

[16] As mentioned above, a careful consideration of the factors enunciated in *Zinn*, namely the offender, the crime and the interest of society, epitomises the very essence of a balanced, effective sentence which meets all the sentencing objectives.¹² In the present matter both the victim and the accused were attending the same school. The accused was a young adult of 19 years when he committed the offence. He has not brushed with the law in the past and is therefore a first offender.

[15] It appears that the accused did not have an ideal family background since he was orphaned at an early age. There was unfortunately no further investigation around his upbringing and his present living circumstances, except that he was financially dependent on one of his brothers. Nor does it appear that there had been any attempt to establish the school progress of the accused at the time of his arrest, something that could have edified the court as to the type of learner he was. Whilst we are at a disadvantage due to lack of information that could have assisted this court, it is my view that the appellant's personal circumstances do make out a case for the existence of substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of life imprisonment. This then brings me to a determination of an appropriate sentence.

[16] The accused has been convicted of a serious crime. Rape is a crisis of epidemic proportions particularly on young children. Our courts have also accepted that the public is rightfully outraged by this rampant scourge¹³. However, sight must

¹² 2013 (2) SACR 292 (SCA)

¹³ *S v RO* 2010 (2) SACR 248 (SCA) para 1

never be lost of the role which the judicial officer ought to play, described by Corbett JA in *S v Rabie*¹⁴ in the following terms:

‘A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.’¹⁵

[17] In *S v Phulwane and others*¹⁶, the appellants were aged 20 years, 22 years and 18 years respectively. They were all sentenced to direct terms of three years’ imprisonment. Although the appellants were convicted of a much lesser crime of housebreaking as opposed to the appellant in this matter, the following comments expressed by the appeal court are of relevance to the matter before us:

‘When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officers invested with the task of sentencing such a youth to ensure that she or he receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best suit the needs and interest of the particular youth. It is after all, a salutary principle of sentencing that sentence must be individualised. I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever sentence he or she decides to impose will promote rehabilitation of that particular youth and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course, the community.’

¹⁴ 1975 (4) SA 855 (AD)

¹⁵ Ibid 866A-B

¹⁶ 2003(1) SACR 631 (TPD) 634h-j

[18] Obviously the offence that was committed by the accused is serious and deserving of a custodial sentence. However, having weighed the mitigating factors against the aggravating ones as already alluded to earlier, the statutorily prescribed minimum sentence falls to be set aside. As a result, this court is at large to impose sentence afresh. The offence is nonetheless, deserving of severe punishment so as to recognise the gravity of the offence and reflect appreciation for society's abhorrence thereof.

[19] In the circumstances, I am of the view that a sentence of 18 years' imprisonment is appropriate and would meet the objectives of sentencing in this particular matter. According to the record, the appellant has been serving his sentence since he was sentenced in the court below on 5 September 2018. The sentence should consequently be antedated accordingly.

[20] In the result the following order is made:

1. The appeal against the sentence of life imprisonment is upheld.
2. The sentence of the court below (dated 5 September 2018), is set aside and replaced with the following:
 'The accused is sentenced to 18 years' imprisonment'.

V. M. Nqumse

Acting Judge of the High Court

I agree:

I.T. Stretch

Judge of the High Court

For the Appellant : S. Njisane

Instructed by : Legal Aid South Africa

For the Respondent : D. Trietsch

Instructed by : The Director of Public Prosecutions, Mthatha

Heard on : 15 June 2022

Judgment handed down on : 16 August 2022