



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

Reportable:	YES / NO
Of Interest to other Judges:	YES / NO
Circulate to Magistrates:	YES / NO

Appeal Number: A29/2019

In the matter between:

SELLO AUGUSTINAS NThERI

Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, J *et* MURRAY, AJ *et* MOROBANE, AJ

JUDGMENT: MOROBANE, AJ

HEARD ON: 10 MAY 2019

DELIVERED ON: 04 JULY 2019

- [1] This is an appeal against the sentence imposed by a single judge of this division on 14 February 2018. The appellant was convicted of rape and sentenced ‘*to 15 years’ imprisonment less one year he has already served and therefore totalling 14 years.*’ The application for leave to appeal was granted by the Supreme Court of Appeal on petition after it was refused by the court *a quo*.

- [2] The appellant was originally charged with one count of murder and one count of rape. However, no causal link could be established between rape and the victim's death. As a result, the State withdrew the murder charge against him.
- [3] The brief facts are that the appellant was charged with rape in that he penetrated the complainant's vagina with a hosepipe without her consent. He pleaded guilty to the charge and was convicted on the strength of his admissions set out in a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ("the CPA").
- [4] In ***S v Malgas***¹ Marais, J remarked as follows:
- ‘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 the 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were the court of first instance.’
- [5] It is trite law that an appeal court will not lightly interfere with the findings of the trial court unless the latter has misdirected itself or has committed an irregularity. In this instance this court of appeal is justified to interfere because the trial court misdirected itself by taking into account the mental retardation of the complainant; her

¹ *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12

death; and the fact that the appellant's relationship with the complainant was one of domestic violence. No evidence was led to establish her being mentally challenged, or a relationship based on domestic violence, or a causal link between rape and the death of the complainant. The Court also misdirected itself when the appellant was convicted of rape in terms of Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, with the prescribed minimum sentence of 15 years for a first offender. The correct provision is Part III of Schedule 2 with the applicable prescribed minimum sentence of 10 years for a first offender like the appellant. The trial court's point of departure in imposing the sentence for rape should therefore have been 10 years.

[6] Any death of a person is unfortunate, especially when it was caused by the direct results of a crime. In the present case, no evidence was led during the proceedings on the complainant's death or the cause thereof. The same is also true with regards to the domestic violence. However, the trial court was persuaded by the prosecution's heads of argument and it erroneously took into account the death of the complainant and the issue of domestic violence during the sentencing procedure. This approach was not appropriately taken as it cannot be sustained by any evidence during the proceedings.

[7] The trial court is bound to impose the prescribed minimum sentence upon conviction of the appellant, unless the latter satisfied the court that a lesser sentence had to be imposed. To invoke this provision, the appellant had to demonstrate to the court

that substantial and compelling circumstances existed to justify the deviation. One of the principal grounds of appeal was that the trial court did not properly take the appellant's mitigating circumstances into cognisance and that it failed to find that they constitute substantial and compelling circumstance.

[8] In re-assessing the sentence of the trial court, the court of appeal should consider the mitigating circumstances and weigh those against the aggravating ones. In the circumstances of this case, the aggravating factors are that the appellant was in a relationship with the complainant, and that the crime was of such an abhorrent nature.

[9] The mitigating factors, on the other hand, are that:

- (a) the appellant is a first offender at the age of 52 years. He had a clean criminal record for most of his adult life;
- (b) he pleaded guilty and cooperated with the police upon his arrest by making a pointing out;
- (c) he showed remorse and cried during his evidence in mitigation of sentence. He also asked for forgiveness from the complainant's family;
- (d) he was intoxicated during the incident which affected his moral blameworthiness, but still appreciated his actions. He is not used to drinking alcohol;
- (e) he is a primary caregiver to a minor child, an aspect which was not properly dealt with during sentencing in regard to section 28(2) read with section 28(1) of the Constitution;

- (f) the Court over-emphasised the seriousness of the offence by referring to the death of the complainant in the absence of evidence of a causal link between rape and her death; and
- (g) that the appellant spent 12 months in custody awaiting trial.

[10] In my view the mitigating circumstances, considered cumulatively, when weighed up against the aggravating ones do constitute substantial and compelling circumstances. It then follows that the existence of substantial and compelling circumstances justifies a deviation from the prescribed minimum sentence of 10 years.

[11] A judicial officer should not approach punishment in the 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 interest of the society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity.²

[12] In **S v Siebert**³ Olivier JA stated that sentencing requires a willingness on the part of the trial court to actively explore all the available options and to choose the sentence best suited to the crime, the criminal, the public interest, and also the aims of punishment. The court has the authority to determine the extent and nature of the sentence it may impose.

² *S v Rabie* 1975 (4) SA 855 (A) at 866A-C

³ *S v Siebert* 1998 (1) SACR 554 (AD) at 559B-D

- [13] In view of the above, the said mitigating circumstances do constitute substantial and compelling circumstances as demonstrated by the appellant. In this regard the trial court also materially misdirected itself in not finding that the mitigating circumstances of the appellant did constitute substantial and compelling circumstances. That provides further justification for the re-assessment and setting aside of the sentence imposed by the trial court.
- [14] The respondent conceded that the sentence imposed by the trial court is excessive in view of the appellant's mitigating circumstances. It is indeed so that the sentence imposed is inappropriate and disproportionate. A deviation from the prescribed minimum sentence was necessary under the circumstances, using as point of departure a minimum sentence of 10 years' imprisonment. The erroneous imposition of a minimum sentence of 15 years' imprisonment instead of the applicable 10 years was the first misdirection on the part of the trial court, and the failure to reduce the prescribed sentence where the substantial and compelling circumstances existed was the second misdirection. The third was the direct subtraction from the imposed sentence of the Appellant's one year spent in custody.
- [15] In terms of section 282 of the CPA, whenever a sentence of imprisonment is set aside on appeal and replaced, the subsequent sentence imposed may be antedated if the court is satisfied that the person has already served any part of the sentence imposed on conviction.

[16] In **S v Seekoei**⁴ the court confirmed that a trial court may not antedate a sentence, unless its original sentence had been set aside on appeal or review and the matter referred back to it to impose an appropriate sentence. The way the order of the trial court was formulated, it was therefore rendered an incompetent order which needs to be set aside and substituted with a competent one.

[17] I would therefore propose the following order:

1. The appeal against the sentence is upheld;
2. The sentence imposed by the trial court is set aside and replaced with the following:
 - (i) The accused is sentenced to 8 years' imprisonment, and the sentence is antedated to 15 February 2018.

V.M. MOROBANE, AJ

I concur, and it is so ordered.

M.A. MATHEBULA, J

I concur.

H. MURRAY, AJ

⁴ S v Seekoei 1997 (1) All SA 40 (NC) at 45A-46B

On behalf of the appellant:

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