



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: CA&R40/2018

Heard on: 06/05/2019

Delivered: 08/08/2019

In the matter between

DONALD TSHEPANG LEEUW

Appellant

V

THE STATE

Respondent

Coram: Phatshoane J et Pakati J

JUDGMENT ON APPEAL

PAKATI J

- [1] This is an appeal against a sentence of life imprisonment in terms of section 309 (1) (a) of the Criminal Procedure Act ("the CPA")¹. The appellant, Mr Donald Tshepang Leeuw, a 35 year old male person, appeared before the Regional Magistrate Pieterse in Barkley West on two charges of rape of an eight year old girl. In Count 1 it was alleged that he raped her vaginally using his penis and in the second count by inserting his finger into her anus.
- [2] The appellant pleaded not guilty to the charges but was nevertheless convicted on both counts on 16 March 2018 and was sentenced to life imprisonment in respect of each count. On 06 July

¹ Act 51 of 1977; Section 309 (1) (a) provides that all persons sentenced to life imprisonment by a regional court under section 51 (1) of the Criminal Law Amendment Act, 105 of 1997, may note an appeal without having to apply for leave to appeal in terms of section 309B.

2018 he filed a notice of intention to appeal his convictions and sentences. Mr Van Tonder, for the appellant, conceded that he was unable to formulate any convincing argument in respect of both the convictions and the sentence imposed on Count 1. The appellant now appeals against the sentence of life imprisonment in respect of Count 2.

- [3] The appellant contended that the sentence of life imprisonment is shockingly inappropriate. He contended further that the court *a quo* should have imposed a lesser sentence taking into account the facts of the case and his personal circumstances. He argued that it overemphasised the interests of society and the deterrent effect of sentence.
- [4] On or about 24 March 2013 between 19h00 to 20h00 at or near Haak and Steek, Matalang, Barkley West, Ms AR, the complainant's mother, was on her way to hand over an amount of R30-00 to another lady called Nono. She was in the company of the complainant who was eight years at the time. She then gave the complainant a R2 coin to buy some simba chips at a nearby tuck shop about 20 metres away. Ms AR proceeded to Nono's house and waited there for her. She noticed that the complainant was taking long to return. She estimated an hour. She became anxious and went out to look for her. She searched for her at her mother's place and everywhere. The complainant's father arrived and joined the search. They went to her mother's place again and found her there. The complainant reported to them that she had been raped by someone who she would be able to identify. The matter was reported to the police.
- [5] Ms AR observed that the complainant's clothing was blood stained. She also had blood in and around her private parts. She was crying. She was hospitalised in Kimberley Hospital for three weeks.

- [6] The day of the incident the police took the complainant to the mountain where the rape took place and took photos. About a month later the complainant was playing outside her home with her friends and returned running. She told her mother that she had seen the appellant and pointed him out as the person who raped her. When Ms AR drew closer she realised that it was someone she knew prior to the incident. Police were called and he was apprehended.
- [7] The complainant corroborated the evidence of her mother, Ms AR. She added that on her way to the tuckshop someone grabbed her from behind, held her *'like a baby* using his left hand and covered her mouth with his right one. He asked her who her parents were to which she proffered no response. The appellant proceeded to the veld with her. In the veld he undressed her of her clothes. At that stage she requested to go and relieve herself, which she did. As she was busy relieving herself she looked around with the intention of fleeing but the appellant had a big rock in his hand and threatened to injure her with it. He grabbed her and put her on top of a rock. He pulled his pants down, climbed on top of her and inserted his penis into her vagina thereby having sexual intercourse with her. After that he turned her around and penetrated her anus using his finger. After satisfying himself he asked her to dress up. He put his penis inside her mouth and ordered her to suck it, which she did. She testified that she sucked it until she felt something coming out of it. He then ordered her to get dressed again and told her to go to a jazz club with him to have sexual intercourse again. However, she picked up her shoes and fled the scene. She testified that it was dark when the incident took place but the moon had given some light. It was also raining. The appellant was wearing a Kaizer Chiefs' hat.

- [8] At home the complainant informed her grandmother of her ordeal. At that stage her parents arrived and she also informed them about the rape incident. Thereafter they proceeded to the police station and a case was registered. She confirmed her mother's evidence that the police took her to the scene where photos were taken.
- [9] In hospital the complainant was operated twice and hospitalised for three weeks as Ms AR testified.
- [10] About a month later, on a Saturday the complainant was playing with her friends outside the yard when she recognised the appellant as the person who raped her. She ran home to alert her mother and police were called. She and the police went inside a tavern called Makeha to identify the appellant, which she did. He was then apprehended. He was still wearing the same hat he had on the day of the incident. She testified that the hat was not the only thing she identified him with. She also recognised him as he looked him straight in his eyes when he raped her. She disputed that she told Ernest Paulus, a constable in the South African Police Services, that the appellant had dreadlocks.
- [11] A forensic analyst in Cape Town laboratory, Mr NL Tiya, confirmed that the appellant's DNA was found on the panty of the complainant and could also be read into the mixture of the DNA found on the rectal swab. It was also found on the complainant's pair of jeans, hence the concession regarding the convictions and the life sentence in respect of Count 1.
- [12] When the court *a quo* sentenced the appellant it took into account his personal circumstances thus:
- 12.1 He was 37 years old, unmarried but living with his common law wife for the last ten years;

12.2 He had four children, two of them aged 14 years, 5 years and 3 years. Two of these children are his common law wife's. He paid maintenance for his children in the amount of R600-00 per month;

12.3 He completed Grade 8 at school, Standard 6 in today's terms;

12.4 His common law wife was unemployed and she and the children depended on him for support;

12.5 He was working for Kelm Transport for the last seven years as a foreman or supervisor earning R4 500-00 per month; and

12.6 Most importantly, he was a first offender.

[13] The court *a quo* also took into account that the complainant was eight years old and raped more than once. It remarked that the appellant could consider himself fortunate that he was not charged with three counts of rape and said:

'Nadat u haar vaginaal verkrag het en die skeure en die beserings wat die dokter opgemerk het, moes sy gebloei het maar dit het nie vir u gestuit om voort te gaan om haar anaal en weer oral te verkrag nie. So u het vir haar geen genade gehad nie.'

[14] Mr Van Tonder argued that regarding Count 2 the appellant penetrated the complainant by inserting a finger in her anus. It was therefore not an act of rape deserving of life imprisonment and requested that it be replaced with a suitable sentence. Mr Makhaga, for the respondent, submitted that the sentence of life imprisonment did not induce a sense of shock.

[15] In **S v MATYITYI** the Supreme Court of Appeal, following **MALGAS**² had this to say:

'[23] Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As Malgas

² 2001 (1) SACR 469 (SCA) at paras [23] & [24]

makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.

[24] ... In my view there were no substantial and compelling circumstances present that warranted a departure from the prescribed statutory norm. ... Having regard to all of the circumstances encountered here, the minimum sentences is a manifestly fair and just one. To my mind, this is precisely the type of matter that the legislature had in mind when it enacted the minimum sentencing legislation.'

[16] Nugent JA in **S v VILAKAZI**³ held:

'It is clear from the terms in which the test was framed in *Malgas* [2001] (1) SA 1222; 2001 (1) SACR 469 (SCA) and endorsed in *Dodo* [2001 (3) SA 382; 2001 (1) SACR 594 (CC)] 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.'

[17] Mr Van Tonder submitted that although the personal circumstances of the appellant were favourable, '*nothing stands out to such an extent that it could be described as substantial and compelling.*' I agree. The offences with which the appellant was convicted of are very serious in nature and prevalent in this area of jurisdiction. What aggravates this case is the following:

17.1 The complainant was eight years old when the incident took place;

17.2 The appellant threatened to injure her with a stone if she did not co-operate with him;

³ 2012 (6) SA 353; 2009 (1) SACR 552 (SCA) at para 15

17.3 She was abducted in the night after just parting ways with her mother on her way to the tuck shop;

17.4 After having been subjected to rape vaginally and anally she was forced to suck the appellant's penis, the most disgusting thing a child can be subjected to do;

17.5 She sustained serious injuries to her vagina and anus;

17.6 She had to undergo two operations and was hospitalised for three weeks; and

17.7 She was traumatised by the ordeal.

[18] Holmes JA in **S v De JAGER**⁴ stated:

‘It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.

[19] The court *a quo* found no substantial and compelling circumstances in the personal circumstances of the appellant, correctly in my view. The Legislature has ordained the sentence of life imprisonment as prescribed in the Criminal Law Amendment Act⁵. There are no substantial and compelling circumstances in the personal circumstances of the appellant justifying a departure from the imposition of the prescribed sentences.

[20] In my view, the sentence of life imprisonment does not induce a sense of shock and is not disproportionate to the crime, the criminal and the interests of society. The court *a quo* did not misdirect itself when it sentenced the appellant to life imprisonment. The two life

⁴ 1965 (2) SA 616 (AD) at 628H –629A

⁵ Act 105 of 1997

sentences run concurrently in terms of section 39 (2) (a) (ii) of the Correctional Services Act.⁶ For the afore-going reasons the appeal must fail.

ORDER

The appeal against the sentence of life imprisonment in respect of Count 2 is dismissed.

B PAKATI J

PHATSHOANE J

[21] I have had the privilege of reading the separate judgment of my colleague Pakati J and find it unnecessary to regurgitate the factual milieu because I agree largely with her line of reasoning and the conclusion reach. However, I wish to amplify briefly certain aspects for my concurrence.

[22] The complainant suffered untold anguish both mentally and physically regard being had to her state of vulnerability and her under-developed anatomical makeup. She was in tears when she reported the incident to her parents. Her mother says that her abdomen was covered in blood. She must have been haemorrhaging profusely because the complainant says her father's clothes were also covered in blood as he carried her to the scene and to the hospital.

⁶ Act 111 of 1998

[23] In terms of the victim's impact report, compiled by Ms Vanessa Botha, the offences committed by the appellant had a long lasting impact on the complainant's dignity. Although this did not significantly affect her scholastic activities it certainly destroyed her outlook on life. She was still traumatized when Ms Botha interviewed her. Ms Botha explained that it will take long for the complainant's emotional scars to heal, if ever. I must add that the complainant also broke down in tears when testifying in Court.

[24] This was a barbaric type of rape. The penetration by a finger into the complainant's anus must have been vicious. I say this because Doctor Esme Olivier, who examined the complainant following the incident, found four circumferential tears on her anus. The fact that on Count 2 the appellant inserted his finger into the complainant's anus does not, in my view, ameliorate the gravity of the offence. To fortify my conclusion I can do no more than to refer to this remark in *S v Mahomotsa*⁷:

'...(T)here 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'

[25] The appellant's personal and mitigating circumstances as correctly conceded to by his counsel and found by my Sister Pakati J are nothing out of the ordinary. He clearly did not show any contrition. Our little girls and the community at large need protection from the Courts against the likes of the appellant who prowl the streets at night to abduct defenseless victims and callously raping them. A

⁷ 2002 (2) SACR 435 (SCA)

conspectus of the mitigating circumstances weighed up against the aggravating features does not lead, in my view, to the conclusion that the sentence imposed on Count 2 was unjust. There can be no question that justice was served. The ineluctable conclusion is that the appeal must fail and it is so ordered.

MV Phatshoane J

On behalf of the Applicant: Adv A Van Tonder
Instructed by: Legal Aid South Africa, Kimberley

On behalf of the Respondent: Adv RR Makhaga
Instructed by: OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS