

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

CASE NO.: CA & R 127/2017

In the matter between:

SICELO ROZANA

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

HUISAMEN AJ

[1] The Appellant in this matter, an adult male who was 33 years old at the time of the commission of the offences, has been convicted of

the kidnapping and rape of a 14 year old girl in the Sterkspruit area. The offences occurred on 17 December 2010.

- [2] On 8 December 2012 the Appellant was convicted on both counts in the Regional Court in Sterkspruit.
- [3] On the count of kidnapping the Appellant was sentenced to 12 months imprisonment and on the count of rape the Appellant was sentenced to imprisonment for life. The Appellant was also declared unfit to possess a firearm. The sentences were handed down on 8 December 2012.
- [4] This appeal is against sentence only.
- [5] Because of the complainant's tender age, the offence of rape attracted a minimum sentence in terms of Section 51(1) of the Criminal Law Amendment Act No 105 of 1997, as amended.
- [6] The circumstances within which the offences were committed are shocking. On 17 December 2010 the complainant and other friends were on their way home from a clinic where they had a braai. Whilst walking past the home of the Appellant, he pounced upon her and

pulled her towards his home. He was armed with a knife and a stone. He assaulted the complainant with the stone. One of the complainant's friends tried to intervene, but was chased away by the Appellant. The Appellant forced the complainant into his home, where he then had sexual intercourse with her without her consent. During the course of the assault the Appellant hit the complainant with a stone and also tore her pair of trousers with his knife. The complainant's father later arrived at the home and removed his daughter.

- [7] The Appellant's version was initially that he was in a relationship with the complainant. He denied, however, that he had intercourse with her during the night in question.
- [8] In arriving at the sentences which were imposed, the learned Magistrate took into account the Appellant's personal circumstances, the seriousness of the crime as well as the interest of the community.
- [9] The Appellant was a middle aged man of 33 years old at the time of the sentencing, unmarried with no children. He had passed grade 12 at school and was unemployed. He had a list of previous convictions

of housebreaking with intent to steal and theft for which he had received prison sentences over a number of years.

[10] The Magistrate took into account that, to a lesser extent, the Appellant acted under the influence of liquor.

[11] However, the Appellant still had the strength and courage to confront the complainant and overpower her.

[12] The Magistrate emphasized the fact that rape was a very serious offence which had reached alarming proportions in the district of Sterkspruit, where the offences were committed. The Magistrate therefore emphasized that it was in the interests of the community that the sentence would have a deterrent effect on those who may contemplate committing such crimes.

[13] The Magistrate, in the circumstances of the matter, was unable to find compelling and substantial circumstances which would justify a lesser sentence than the prescribed minimum sentence.

[14] I can do no better in this matter but refer to the matter of Mqikela v S (CA 119/07) [2009] ZAECGHC 74; 2010 (2) SACR 589 (ECG) where Jones J held as follows in paragraph [3]:

“[3] A court of appeal has no general power to set aside the sentence of the trial court. The imposition of sentence is within the discretion of the trial court, and the court of appeal may interfere only if that discretion has not been exercised in a proper judicial manner (*S v Giannoulis* 1975 (4) SA 867 (A) per Holmes JA 868 and *S v Kgosimore* 1999 (2) SACR 238 (SCA) 241 para 10). Further, the findings of fact upon which the trial court has based its sentence are, in the absence of a misdirection of law or fact, presumed to be correct. The court of appeal will not depart from them unless it is satisfied from the record of the evidence that they are clearly wrong (*Rex v Dhlumayo* 1948 (2) SA 677 (A) 705 and *S v Francis* 1991 (1) SACR 198 (A) 204c-f)). To bring this argument within these principles counsel for the appellant submitted that in coming to the conclusion that there were no substantial and compelling circumstances the learned trial judge overemphasized the gravity of the offence and the interest of society at the expense of the interests of the appellant as disclosed by his personal circumstances, and that this vitiated her imposition of the prescribed sentence of life imprisonment (*S v Malgas* 2001 (1) SACR 469 (SCA); *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); and *Vilakazi v S* [2008] ZASCA 87; [2008]

4 All SA 396 (SCA)). Vilakazi's case (para 14) rephrases the essence of the Malgas principle, which lays down a determinative test of proportionality. The judgment continues (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. The Constitutional Court made it clear that what is meant by the "offence" in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise)

'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'.

If a Court is indeed satisfied that the lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence."

What is required is that the trial court should test the justice and proportionality of the prescribed sentence by weighing and balancing all factors relevant to the nature and seriousness of the criminal act itself (in the light of the legitimate concerns of society), 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. If that exercise shows that a lesser sentence than life imprisonment would be appropriate, it is not only justified but bound to impose the lesser sentence."

[15] In my view the learned Magistrate did not misdirect himself by ignoring the Appellant's personal circumstances. The Magistrate furthermore correctly held that the intake of liquor did not reduce the Appellant's capacity appreciably.

[16] The Magistrate furthermore evaluated the Appellant's personal circumstances in conjunction with the objects of criminal punishment and the interests of society.

[17] In my judgment, there is no basis on which to find that the Magistrate was incorrect in his evaluation of the relevant principles applicable to sentencing. He exercised his discretion properly.

[18] I do, in particular, not believe that the Magistrate overemphasized the gravity of this rape, which is a terrible crime.¹ The seriousness of the crime of rape is emphasized by the fact that the legislature has singled it out as one of the crimes for which compulsory sentences must be imposed in terms of the Criminal Law Amendment Act of 1997.

[19] A serious aggravating factor is the fact that the complainant was a mere 14 years old at the time.

[20] In these circumstances a lesser sentence would be insufficient to convey to the Appellant the gravity of what he had done and to impose sufficient retribution for his crime. This applies to both counts.

In the circumstances the appeal is dismissed.

¹ See *S v Chapman* [1997] ZASCA 45; 1997 (2) SACR 3 SCA; *S v Ncheche* [2005] ZAGPHC 21; 2005 (2) SACR 386 (W) at paragraph 25

J D HUISAMEN

ACTING JUDGE OF THE HIGH COURT

GRIFFITHS, J. : I Agree

R E GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT : Mr Kekana

INSTRUCTED BY : Legal Aid Board

COUNSEL FOR RESPONDENT : Mr Joubert

INSTRUCTED BY : Director of Public Prosecutions

HEARD ON : 10 AUGUST 2018

DELIVERED ON : 21 AUGUST 2018