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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. CC 06/2018

In the matter between:

THE STATE

VS

XOLISA SIYEKA

ACCUSED NO. 1

MNCEDISI VUBA

ACCUSED NO. 2

JUDGMENT ON SENTENCE

JOLWANA J

[1] The accused were convicted of having raped the complainant, S Q. They must now be sentenced for the said offence.

[2] At the risk of being repetitive, the circumstances in which this crime was committed are worth mentioning again. The complainant was in her own community in which she was born enjoying herself with alcohol together with other members of the community all of whom were known to her and they all knew her. Some of the people were not only known to her but were related to her. She testified that she and the late Z S were cousins and that she was related to the S family through her maternal aunt. The circumstances in which the drinking was taking place as described above are such that she had every right to take for granted that she was safe despite the alarmingly high violent crime levels in this country especially rape, and violence against women and children, who are the most vulnerable in our society.

[3] When N, the eye witness to the accused's criminal activities that night saw them violating her on different occasions, starting with what she called "*fingering*" and thereafter taking turns to rape her whilst she was deep in her drunken sleep, they were undeterred despite her admonishment. The accused had no regard for the complainant's dignity not only as a human being but also as a woman. They saw her as an object of their entertainment, no different from other utensils they were using to entertain themselves. They objectified, used and abused her with no shame, stripping her naked, others would watch while one of them would be having sexually intercourse. During all of this, at times the complainant would cry in her defenceless drunken stupor.

[4] For a crime such as this the Legislature has prescribed a minimum sentence. In terms of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 life imprisonment is the prescribed sentence. This is so because the complainant was raped by more than one person namely, accused no.1, accused no.2 and the late Z S all of whom took turns in raping her, assisting one another in their despicable conduct acting in the execution or furtherance of a common purpose of sexual gratification.

[5] In *S v Malgas* [2001] 3 ALL SA 220 (A) it was stated that a court was required to approach sentencing conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances.

[6] Having said this, it must also be born in mind that the Legislature, in its wisdom decided, correctly in my view, to leave it to the courts to decide what the substantial and compelling circumstances are in any given case, justifying a departure from the prescribed sentences. No court has or is able to give an exhaustive list of what those circumstances should be in any given case. The uniqueness of the circumstances of each case make sentencing innately difficult if not controversial.

[7] In a number of decisions our courts have repeatedly made certain pronouncements on the approach that a court considering a sentence should adopt where a prescribed minimum sentence is applicable. In *S v Homareda* 1999 (2) SACR 319 (W) para 326 it was stated that:

“The correct approach in exercising the discretion conferred on the Court in section 51 of 105 of 1997 is:

- (1) The starting point is that the prescribed minimum sentence must be imposed,
- (2) Only if the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence may it do so,
- (3) In deciding whether substantial and compelling circumstances exist, each case must be decided on its own facts and the court is required to look at all the factors and consider them cumulatively; and
- (4) If the court concludes in a particular case that a minimum prescribed sentence is so disproportionate to the sentence which would have been appropriate ... it is entitled to impose a lesser sentence.”

[8] It is now trite that a sentencing court does have a discretion to depart from the prescribed minimum sentence if the jurisdictional factors for the exercise of that discretion exist. Those are the substantial and compelling circumstances justifying a departure from a prescribed minimum sentence which the Legislature has ordained that it should ordinarily apply or be imposed. In *Malgas* the court said that in finding that substantial and compelling circumstances exist justifying a departure courts are to respect and not pay lip service to the Legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.

[9] It was submitted on behalf accused no.1 that he is a first offender and relatively young at the age of twenty four years. He lives with his elderly parents and his father receives old age pension. He was severely injured when he was stabbed by the complainant’s mother as a result of which he had to spend a period of more than a month in hospital. He has not fully recovered. A letter addressed by the Hospital Section of the Queenstown Correctional Centre dated 15 June 2018 was submitted as exhibit “F”. The letter is addressed to the Head of Section, Queenstown Correctional Centre. In that letter the accused is sought to be excused from doing certain exercises due to an undisclosed medical condition which presumably is the consequence of being stabbed. At hospital he underwent two operations.

[10] Accused no.1 also has a boy child who is three years old. He supported this child from income derived from odd jobs as a labourer and his father also assists with his old age pension in looking after the needs of the child. The child’s mother is still at school doing grade eleven. He himself dropped out of school before completing grade eleven.

[11] In respect of accused no.2 it was submitted that he was raised by his grandparents. His mother passed on while he was still an infant. He also dropped out of school in grade eleven. He also did odd jobs assisting in building operations. He has a four year old child that he supported from his odd jobs as a labourer. He is epileptic and receives treatment from traditional doctors. However, no proof of the diagnosis of his epileptic condition or its severity was submitted. He was thirty one years old when the crime was committed and is a first offender. He was also stabbed by the complainant's mother that night.

[12] It was further submitted on behalf of both of them that liquor played a role in the commission of the offence. It was also submitted that they have spent a period of more than a year in custody and therefore the pre-sentence detention period should be taken into account.

[13] The principles of sentencing as well as the applicable law has been authoritatively stated in our courts on countless occasions. The courts have emphasised the need to try and find the correct balance between the crime, the offender as well as the interests of the society. This is obviously a very serious offence for which the accused have been convicted and the society's expectation for a heavy sentence must be counter balanced with the interest of the accused, including any prospects of rehabilitation as well as the circumstances in which the offence was committed.

[14] The application of the law on sentencing as it relates to cases such as this in which the minimum sentence legislation applies was summarised very concisely by the Supreme Court of Appeal in *S v Vilakazi* 2009 (1) SACR 552 in which Nugent JA aptly articulated the legal position as follows:

"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 the 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." If a court is indeed satisfied that a lesser sentence is called for in the 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."

[15] The balancing act that needs to be done is by no means an easy task. Some of the considerations are in the realm of the state of mind of the accused when the offence was committed. In this case the accused continued with their abhorable conduct even after N had tried to stop them. In fact at some point accused no.1 wanted to assault N in their determination to prey on the defenceless complainant who could not even stand on her own. If a woman such as the complainant decides to entertain herself and drink liquor, she is entitled to do so in the same way that men are entitled to enjoy themselves in whatever lawful manner they choose to. It cannot be accepted that if a woman gets drunk she must be victimised and preyed on as vultuously as the accused did to the complainant.

[16] What makes men such as the accused person arrogate to themselves the right to have sexual intercourse with a woman without her consent, whose only sin is to get drunk and fall asleep is a twisted evil mind which is nothing short of an abomination.

[17] As was pointed out by Ms Govender, counsel for the state, the complainant received unwarranted public and media attention which is hugely humiliating and degrading. It makes it worse that in evidence before court the accused tried to insult the complainant by making spurious accusations against her to create the impression that she is a woman of loose morals who sleeps around indiscriminately. That was literally adding insult to injury and very disrespectful to the complainant.

[18] Like vultures they preyed on her repeatedly taking turns to rape her. The public anger and indignation is well founded and justified. They never showed any remorse nor was it submitted that they were remorseful or regretted what they had done to the complainant. Their main concern was to ensure that they escaped the consequences of their unlawful and despicable conduct.

[19] However, as indicated above our justice system requires that a proper balance be struck between the gravity of the offence, the interests of the society and those of the offender, the so-called triad in the sentencing realm. It is indeed true that the accused are first offenders as their counsel, Mr Gxaba submitted, as no previous convictions were proved by the state. The crime itself was committed in circumstances in which there was a drinking spree of liquor, as their counsel put it.

[20] When the mother of the complainant was called and told that her daughter was being raped by the accused, she armed herself with a knife precisely because of the criminal activities of young men like the accused in that community of Zwartwater who make it unsafe for women to walk freely at night. When she entered Zamide's bedroom and saw what they were doing to her daughter, she described herself as having become very emotional. I understood her to mean that she was overcome with anger, justifiably so seeing her child being raped by one of the accused, while others were waiting to take their turns with their pants already at their knees, a horrendous sight for any parent.

[21] However, it must be born in mind that public anger and indignation, while not to be disregarded, but should not outweigh other relevant considerations as mentioned above. The Supreme Court of appeal has made it very clear that in sentencing, courts must be careful of being swayed or influenced by public opinion as they do the balancing act. Harms JA cautioned as follows in *S v Mhlakaza* [1997] 2 All SA 185 (A)

"7....it is necessary to express a general note of caution. The object of sentencing is not to satisfy public opinion but to serve the public interest. (CF Ashworth and Hough Sentencing and the Climate of Opinion [1996] Crim LR 776; *S v Mafu* 1992 (2) SACR 494 (A) 496 g-j.) A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence, even if the sentence does not satisfy the public. In this context the approach expressed in *S v Hyperlink and Another* [1995] ZACC3; 1995 (2) SACR 1 (CC) para 87-89 (per Chaskalson P) applies *mutatis mutandis*: public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public. That in the words of Schreiner JA in *R v Karg* 1961 (1) SA 231 (A) 236 B-C, does not mean that it is "wrong that the natural indignation of interested parties and of the community at large should receive some recognition in the sentences the courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands". But he added, "righteous anger should not becloud judgment."

[22] I have considered all the evidence, the seriousness of the offence, the circumstances of drunkenness in which the crime was committed, the personal circumstances of the accused, the fact that on the night in question all three assailants were stabbed, one of them fatally. Accused no.1 spent a period of more than a month in hospital consequent upon being stabbed and had to undergo two operations. Accused no.2 spent six days in hospital. Both of them have been in detention since their arrest for a period of fifteen months.

[23] I have also considered the pain both physically and emotionally that the complainant went through and must still be going through. It goes without saying that her dignity was trashed and she will forever live with the embarrassment of having been made a public spectacle of the events of that day, the 2 September 2017, a day she probably will never forget. Whether or not she will ever completely recover and regain her dignity as a woman will never be known.

[24] The interest of the society and the public indignation and abhorrence of this offence especially the Zwartwater community who, on the evidence of Mrs Q, are besieged by crime perpetrated by people such as the accused are all matters that I have considered in deciding on an appropriate sentence. I have concluded that substantial and compelling circumstances exist justifying a departure from the minimum sentence of life imprisonment as provided for in section 51(3) of the Criminal Law Amendment Act. Having said that a very significant period of incarceration is not only justified but also required to send a clear message to the youth and other criminals in that community that their criminal conduct of taking advantage of women and other vulnerable members of the community will be punished severely by the courts.

[25] Accordingly accused no.1 and accused no.2 are sentenced as follows:

1. They are sentenced to 30 years imprisonment, five years of which is suspended for 5 years on condition that they are not convicted of a sexual offence committed during the period of suspension.
2. The sentence is to be antedated to the 02 September 2017.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State: C. GOVENDER

Instructed by: NPA

MTHATHA

Counsel for the accused: K.M. GXABA

Instructed by: LEGAL AID BOARD

MTHATHA

Heard on: 12 December 2018

Delivered on: 14 December 2018