

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR487/16

In the matter between:

I M M

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

Delivered on: 03 March 2017

ME NKOSI AJ:

[1] The appellant was charged in the court *a quo* with two counts of rape and three counts of housebreaking with the intent to rob and robbery. He initially pleaded not guilty to all five charges preferred against him, but subsequently handed in to the court *a quo* a statement in terms of section 220 of the Criminal Procedure Act¹ (as amended), in which he admitted that he committed four of the five crimes with which he was charged.

[2] The four crimes admitted by the appellant included the one crime of rape and the three separate crimes of housebreaking with the intent to rob and robbery. He

¹ Act 51 of 1977

was found guilty of all four crimes and sentenced to a total of thirty nine (39) years imprisonment, which was deemed appropriate by the court *a quo* after taking everything into consideration.²

[3] In particular, the sentences imposed by the court *a quo* upon the appellant for each offence were fifteen (15) years imprisonment for rape and nine (9) years imprisonment for each one of the first two crimes of robbery committed by the appellant in 2008 while he was still a minor, as well as fifteen (15) years for the crime of robbery that was subsequently committed by the appellant in 2012 after he had already attained majority.

[4] The latter sentence of fifteen (15) years is the minimum sentence applicable for the crime of robbery with aggravating circumstances. Although the judgment of the court *a quo* is silent in that regard, this suggests that the finding of that court was that the appellant was guilty of robbery with aggravating circumstances.

[5] The appellant is appealing, with the leave of the court *a quo*, against the thirty nine (39) years imprisonment sentence imposed upon him by the court *a quo*. Insofar as his conviction of rape is concerned, the appellant has conceded that rape is a serious and heinous offence punishable by life sentence in terms of the Criminal Law Amendment Act.³ In fact he was saved from the imposition of life sentence for the crime of rape by his youthful age of 17 years at the time of the commission of the offence.

[6] However, it was argued by Mr Pillay on behalf of the appellant that the sentence of fifteen (15) years imprisonment for the crime of rape is still too harsh for the appellant when considering his relevant and cumulative personal circumstances. He argued that these were not taken into account by the court *a quo*.

[7] Numerous factors were cited by Mr Pillay in support of his argument. These included submissions that the appellant was just over 17 years old when he committed the first three offences, that he was a first time offender as at the date of his conviction, with no pending cases, and that he had shown remorse by tendering admissions of the crimes he had committed.

² Page 71 line 15 to page 72 line 5 of the record

³ Act 105 of 1997

[8] Insofar as the appellant's sentence for the crime of rape is concerned, I think the appellant should consider himself lucky that he got the sentence of fifteen (15) years imprisonment. Had he been 18 years old at the time when he committed the offence, with a mere two months having been his saving grace, he would have received a life sentence.

[9] In any event, I need not dwell much on the appellant's sentence for rape as it was finally conceded by Mr Pillay that the appellant got off lightly with the fifteen (15) years imprisonment sentence because of his youth when he committed the offence. Otherwise, I have no doubt that his gruesome violation of the complainant would have warranted a life sentence.

[10] Besides, as correctly pointed out by Ms Mshololo on behalf of the respondent, it is trite law that the sentencing falls primarily within the discretion of the trial court. It is only in limited instances when the sentence imposed by the trial court indicates or suggests material misdirection by that court, or is so disproportionate to the crime committed that it induces a sense of shock, that the court of appeal would be justified in interfering with the sentence imposed by the court *a quo*.⁴

[11] In the circumstances, I find no reasonable justification for this court to interfere with the fifteen (15) years imprisonment sentence imposed upon the appellant by the court *a quo* for the crime of rape. That sentence must accordingly stand.

[12] Similarly, I believe that there is no justification for this court to interfere with the sentences of nine (9) years imprisonment that were imposed by the trial court upon the appellant for the first two crimes of robbery committed by him on 13 October 2008. However, as the appellant was still a minor at the time of the commission of these offences, I think it would be appropriate for the sentences imposed for the first two crimes of robbery to run concurrently with the fifteen (15) years sentence for rape.

[13] This brings me to the remaining sentence of fifteen (15) years imprisonment that was imposed upon the appellant by the trial court for the crime of robbery that was committed by the appellant on 24 July 2012. According to the judgment

⁴ S v Malgas 2001 (2) SA at 1232 A to D

delivered by the magistrate in the court *a quo*, the reason for imposing the sentence of fifteen (15) years imprisonment upon the appellant for that offence was because the minimum sentence was applicable to it.⁵ However, it is apparent from the appeal record that the learned magistrate omitted to consider the cumulative personal circumstances of the appellant which would have entitled the trial court to deviate from the prescribed sentence.

[14] The appellant was 22 years old, a first time offender as at the date of conviction, with no pending cases. He also showed remorse for his crimes by tendering admissions to the trial court and accepting responsibility for his actions. Furthermore, although he committed the crime with the use of a firearm, no injury or serious bodily harm was sustained by the complainant during the commission of the offence.⁶

[15] Therefore, when considered cumulatively, I think the personal circumstances of the appellant justify a deviation from the prescribed sentence. I accordingly find that the sentence of fifteen (15) years imprisonment imposed by the trial court upon the appellant for that offence is shockingly disproportionate to the crime he committed that it induces a sense of shock.

[16] In my view, the appropriate sentence which ought to have been imposed upon the appellant by the court *a quo* for the robbery committed by him on 24 July 2012 was imprisonment for the period of ten (10) years. This takes into account the cumulative personal circumstances of the appellant which justify a deviation from the prescribed minimum sentence.

[17] In the circumstances, I propose that the following order should be made:

- (a) that the appellant's appeal against the total sentence of thirty nine (39) years imprisonment imposed upon him by the court *a quo* is granted; and
- (b) that the sentences imposed by the court *a quo* upon the appellant be amended as follows:

⁵ Page 71 line 20 of the record

⁶ Page 8 lines 15 to 20 of the record

- (i) on count 2, that the appellant is sentenced to fifteen (15) years imprisonment;
- (ii) on count 3, that the appellant is sentenced to nine (9) years imprisonment;
- (iii) on count 4, that the appellant is sentenced to nine (9) years imprisonment;
- (iv) on count 5, that the appellant is sentenced to ten (10) years imprisonment; and
- (v) that the sentences in respect of counts 2, 3 and 4 are to run concurrently.

ME NKOSI AJ

I agree:

HADEBE AJ

Date of hearing : 23 February 2017

Date delivered : 03 March 2017

Appearances:

For the Appellant : Adv TP Pillay

Instructed by : Justice Centre
Durban

For the Respondents : Adv ZG Mshololo

Instructed by : The Director of Public Prosecutions
Durban