

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

Appeal number: A151/2015

In the matter between:

THATO VICTORIUS NTEPE

Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE, J et MOHALE, AJ

HEARD ON: 26 OCTOBER, 2015

DELIVERED ON: 22 MARCH 2016

MOCUMIE, J

- [1] The appellant appeared in the regional court, Kroonstad, Free State on four counts. Count 1: Impersonating a police official in contravention of the provisions of the South African Police Service Act 68 of 1995 (the Police Act). Count 2: House breaking with intent to commit an offence unknown to the prosecutor. Count 3: House breaking with intent to rob and robbery read with s1 of the Criminal Procedure Act 51 of 1977 (the CPA). Count 4 rape as defined in terms of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act) and rape read with the provisions of s51 (1) (a) (ii) Part 1 Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act).

[2] On 28 February 2013, the appellant pleaded guilty on all counts. On the same day, he was convicted as charged on his plea. He was sentenced as follows:

- ‘1. Count 1[Impersonating a police official]: 12 months imprisonment
2. Count 2 [housebreaking with intent to commit an offence unknown to the prosecutor] and Count 3 [house breaking with intent to commit robbery with aggravating circumstances] (taken as one for purposes of sentence): 15 years imprisonment
3. Count 4[rape]: Life imprisonment
4. Count 1, 2, 3 will run concurrently with count 4.’

[3] The accepted evidence of the State is that on 31 July 2010, the appellant went to Mrs M’s home and knocked on her door pretending to be a police official in contravention of the Police Act . Mrs M did not believe him and refused to open the door. The appellant then hit a window pane with a brick and gained entry into Mrs M’s house. Inside the house, the appellant had sexual intercourse with Mrs M without her consent and even inserted his finger in her private part without her consent, thereby raping her as defined in s3 of the Sexual Offences Act. He also robbed her of her cellphone.

[4] Mr Kambi, for the appellant, submitted that the trial court misdirected itself materially by not taking into account the following factors as compelling and substantial circumstances. The appellant pleaded guilty which is a sign of remorse. He was incarcerated, on no wrong doing on his part, for almost 19 months, a year and seven months, from 4 August 2009 to 28 February 2011. This, he submitted, the trial court failed to take into account contrary to precedent decisions of the Supreme Court of Appeal which dictate that such incarceration ought to be taken into account in determining whether compelling and circumstantial circumstances exist and the length of incarceration.¹

[5] He submitted further that the trial court failed to take into consideration the following mitigatory factors cumulatively with the factors mentioned above as

¹ *S v Vilakazi* 2009 (1) SACR 552 (SCA) para [60].

compelling and substantial circumstances. The appellant was a first offender. He was employed and earning an amount of R1500 per month. He has one child although not married. He attained grade 12 but did not proceed to tertiary due to financial constraints.

- [6] Mr Pretorius for the State submitted that there were aggravating factors. These were that the appellant failed to play open cards with the trial court and indicate what made him, with all his favourable circumstances, commit such heinous offences. He pleaded guilty but did not testify under oath to indicate that he was truly remorseful. Mrs M was 81 years of age when this rape was perpetuated against her in the sanctity of her home. She stayed alone. Mrs M suffered trauma after the rape ordeal in that she could no longer be left on her own as she used to. The appellant was sufficiently educated. Rape against elderly women who stayed on their own is becoming a frequent occurrence.
- [7] Mr Pretorius submitted further, with reliance on *S v Matyityi*² that the trial court did not err in any manner in its finding that there were no compelling and substantial circumstances which justified the imposition of a lesser sentence than life imprisonment on count 4 and fifteen years in respect of count 3. It took into account all the factors, both mitigatory and aggravating and imposed the sentence the legislature prescribed. The appellant could point to no misdirection in the exercise of the trial court's discretion. Thus there was no need for this court to interfere with the sentence imposed.
- [8] It is relevant to mention at this early stage that the record of the trial proceeding shows that no attempt was made by the State to elicit any evidence on the emotional impact of these offences on Mrs M. No Victim Impact Report was submitted during the trial and in this court. Such a report might have cast some light on this question and beyond that. This happens too often on the part of the State in cases of rape despite the reprimand by

² *S v Matyityi* 2011 (1) SACR 40 (SCA).

the Supreme Court of Appeal in many cases including *S v Vilakazi*³ and *S v Matyityi*⁴. The emotional impact of rape on a rape victim is a relevant and significant factor to be taken into account in the adjudicative process of determining an appropriate punishment for a rape offender. Without a report on that, the sentence imposed is skewed because it lacks the voice of the victim in her own process.

[9] However, there are sufficient compelling and substantial circumstances in this case which justify the imposition of a lesser sentence. These are that the appellant was a first offender. He pleaded guilty; in that way accepted responsibility immediately. He was incarcerated for a year and a half without trial; as a result of no wrong doing on his part. It is trite that the ordinary length of such period remains a cumulatively relevant factor and not an insignificant factor in the deviation equation. Although it is a fact that the Legislature specifically provides under s51(3) (Aa)(ii) that the fact that the victim sustained no physical injuries can no longer be regarded as compelling and substantial circumstances; the fact that Mrs M did not sustain physical injuries is a fact together with other factors that has to be taken into account. The attack is not what the court in *S v Matyityi* described as breathtakingly and brazenly brutal⁵. This case was not marred with brutal horror.⁶

[10] Having considered all the mitigatory and aggravating factors placed before the trial court and this court; there is nothing in the appellant's personal circumstances which is suspiciously indicative of an inherently lawless character. It is significant to note that the trial court did not consider whether the appellant could be expected to offend again. The fact that he did not show any sign of remorse as the trial court found, despite his plea of guilty, is not in itself an absolute indication that, given a chance, he would offend again. There is no evidence that the State presented that suggested that the

³ *S v Vilakazi*, above para [56] – [57].

⁴ *S v Matyityi* above para [16] – [17]

⁵ *S v Matyityi* above para [19]

⁶ Compare with the brutality and violence in *S v Nkomo* 2007 (2) SACR 198 (SCA) at 207. *S v Matyityi* 2011 (1) SACR 40 (SCA). *S v Mosia* 2012 (2) SACR 537 (FB).

appellant is likely to commit these offences again unless he is permanently removed from society. That, on its own, is a material misdirection.

- [11] To the extent that the trial court found that there were no compelling and substantial circumstances which justified a lesser sentence in this case, it erred materially. The sentence of life imprisonment imposed on the appellant is exceedingly retributive and disturbingly disproportionate given his favourable circumstances. This material misdirection calls for this court to interfere.
- [12] A substantial lengthy term of imprisonment will address the seriousness of the offences which he has been convicted of, but justly balance such against his personal circumstances and the interests of society.
- [13] Lastly, count two is clearly a duplication of charges because the plea which the State accepted unreservedly indicated that the accused person broke into Mrs M's house with the intent to rob and rape her. In line with a long list of precedents in this regard, the trial court should not have convicted him on the second count; despite his guilty plea or the State accepting the plea of guilty thereon.⁷ If anything, this anomaly should have been drawn to the attention of the defence. Presiding officers are duty bound not to convict an accused person on his or her guilty plea tendered without ensuring what the accused person is really pleading guilty to. Count two and its sentence automatically fall away.
- [14] To indicate the fact that these are serious offences for which perpetrators must be punished severely, taking into account this rising barbaric attack on elderly women, there will be no order made on the concurrent running of the sentences imposed in respect of counts 2 and 4.

⁷ *S v Grobler* en 'n ander 1966 (1) SA 507 (A) at 516E-H. See also *Whitehead and others v The State* 2008 [2] All SA 527 (SCA) para [35].

[15] In the result the following order is granted

- '1. Count 2 - the conviction and sentence automatically fall away;
- 2. Count 3 - the appeal against sentence succeeds and the sentence is substituted with the following:
'Accused 3 is sentenced to 10 years imprisonment.'
- 3. Count 4 - the appeal against the sentence succeeds and the sentence is substituted with the following:
'Accused 3 is sentenced to 18 years imprisonment'.
- 4. The sentence imposed is deemed to have been imposed on 28 February 2013.'

MOCUMIE, J

I concur

MOHALE, AJ

On behalf of appellant: Attorney S.S Kambi
Instructed by: Bloemfontein Justice Centre
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On behalf of respondent: Adv. K.G. Mashamaite
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