



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

Appeal No.: A38/2015

In the appeal between:-

MORENA ERICK MOFOKENG
LEBOHANG DAN SIBISI

1st Appellant
2nd Appellant

and

THE STATE

Respondent

CORAM: MOLEMELA, JP *et* VAN ZYL, J *et* JORDAAN, J

JUDGMENT BY: MOLEMELA, JP

HEARD ON: 18 APRIL 2016

DELIVERED ON: 22 APRIL 2016

[1] The first and second appellants were indicted on two counts, namely count 1: housebreaking with intent to rape and rape and count 2: robbery with aggravating circumstances. They were both found guilty on count 1 and sentenced to life imprisonment. In respect of count 2, they were convicted of robbery and sentenced to 10 years imprisonment. Pursuant to an unsuccessful bid to the Supreme Court of Appeal to appeal against their conviction, they are, with leave of the court *a quo*, now appealing against their sentence.

[2] The appellants' prosecution and conviction was triggered by the events that happened in Bethlehem on the morning of 28 November 2009. The

extent of the complainant's evidence is that when she went to bed after celebrating her birthday, she secured all doors and windows of her shanty. In the early hours of the morning she woke up to relieve herself. It was at that state that she heard a noise in the kitchen. She proceeded to the inter-leading door to investigate what was happening and was in time to see a man, whom she later identified as Appellant 1, entering the kitchen through the window. This person immediately started swearing at her and threatened to assault her if she screamed. He advanced towards her very quickly and she was unable to flee. He immediately punched her and pushed her onto the bed. He undressed her. She struggled to keep him off and closed her thighs tightly in an attempt to prevent penetration, but he threatened to stab her with a screwdriver and repeatedly punched her on the face and thighs until he succeeded in having his way. He proceeded to rape her. When he was done, he got off her and then called his accomplice by saying: "Gazi, it's your turn." His accomplice also raped her.

[3] Her cellular phone was on the bedside table and the two assailants took it and demanded money. She told them to look for it in the basket knowing fully well that it was not there. This angered the first appellant and he suggested that they stab her with a screwdriver but his accomplice was against the idea. The duo then left. She called her mother, who in turn summoned the police. She made a statement to the police, *inter alia* giving a description of Appellant 1, who was already known to her by sight.

[4] On 31 December 2009 she went to the shops and saw Appellant 1 hanging around the area and immediately recognised him as her assailant. Before leaving the shop, she made enquiries as to his name and address. She then phoned the police to notify them and they advised her to wait at a nearby garage. Upon the police's arrival, she directed them to Appellant 1 and he was arrested. The arrest of Appellant 2 was through the diligent work of a police officer who was investigating a series of rapes in the area. Having discerned that the *modus operandi* was similar to the one adopted in another rape incident in respect of which a suspect was already in custody, he had the presence of mind to arrange for a blood sample to be taken to the forensic laboratory for testing to see whether there could be a DNA link to the

complainant's sample. There was a match and that perpetrator turned out to be Appellant 2. Both appellants were subsequently prosecuted for burgling the complainant's house and raping her, as well as for the robbery of her cellular phone. Since the complainant had not seen the screwdriver that Appellant 1 had threatened to stab her with, the court *a quo* found that their robbery was not with aggravating circumstances and therefore did not attract a minimum sentence.

[5] The essence of the appellants' grounds of appeal is that the court *a quo* misdirected itself by not finding the existence of substantial and compelling circumstances warranting deviation from the prescribed minimum sentence. They submit that the court *a quo* erred by over-emphasising the seriousness of the offences, attaching insufficient weight to the appellants' personal circumstances and failing to consider the period spent by the appellants in custody while awaiting trial, resulting in the imposition of a sentence that is shockingly high and inappropriate.

[6] At the beginning of the hearing counsel for the appellants departed from the written arguments by conceding that the rape the appellants were convicted of was not incorrectly categorised as one committed with a common purpose and acknowledged that the applicable minimum sentence is life imprisonment. This concession was correctly made, considering that cogent evidence proved this common purpose: firstly, Appellant 2 obliged when Appellant 1 indicated that it was his turn to rape the complainant and, secondly, after the two of them had concluded the rape act, they conferred about the way forward and thereafter left the scene together.

[7] Counsel for the appellants, in line with the written heads of argument, persisted in arguing that the rape committed by the appellants could not be categorised as one of the worst kinds of rapes. She further argued that the appellants' mitigating factors, cumulatively viewed, constitute substantial and mitigating factors that warrant deviation from the applicable minimum sentence of life imprisonment. She contended that the court *a quo* had materially misdirected itself by failing to address itself to one of the considerations applicable to sentencing, namely the period spent by the

appellants in custody while awaiting conclusion of their trial. She emphasised that appellant 2's age at the time of commission of the offence was a strong mitigating factor in this regard. The respondent's counsel supported the sentences imposed in respect of both appellants and maintained that the sentences were not disproportionate to the gravity of the offences committed.

[8] The sentencing principles are trite and need not be restated here. The authorities on the application of the minimum sentence legislation are clear. In the case of **S v Malgas**¹ the court stated as follows:

"The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficiency of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

[9] In the case of **DPP North Gauteng Pretoria v Thusi & Others**² three accused persons broke into the house of an elderly woman. One of them raped her, she suffered severe injuries. A sentence of life imprisonment was imposed on the perpetrator of the rape even though he was only 20 years old at the time of commission of the offence.

[10] In the case of **Maile v S**³ a sentence of life imprisonment was confirmed in respect of the 22 year old first offender who had committed the rape at the complainant's house. In **S v Nkunkuma & Others**⁴ a sentence of life imprisonment was confirmed on appeal despite the fact that the two appellants were 21 and 22 years respectively. Both of them had previous convictions.

[11] The appellants' personal circumstances are as follows:

¹ S v Malgas 2001(1) SACR 469 (SCA) at 481j – 482a.

² [2011] JOL 28015 (SCA).

³ [2013] JOL 29883 FB.

⁴ [2013] JOL 30832 (SCA).

Appellant 1 was 24 years old at the time of commission of the offence. Appellant 2 was 20 years old at the time of the commission of the offence. Both of them are single and have no dependants. Appellant 1's highest standard of education is Standard 8. As at the time of his incarceration he made a living from being a traditional dancer. Appellant No 2's highest standard of education is Standard 7. Prior to his incarceration he earned a living from doing odd jobs.

[12] The aggravating factors are as follows: The seriousness of the offence. In S v C⁵, the court aptly described seriousness of the offence of rape in the following terms: "Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim – he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deeds thereafter haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life".

[13] Rape, being a life-altering experience, does not only adversely affect its victims' quality of life, it affects their families too and impacts on the society as a whole. Given the prevalence of the scourge of gender-based violence in this country, the public's need for effective sanctions for rape and related offences must be recognised.⁶ Another serious aggravating factor is that the complainant was raped in her own home, where she would have been expected to be safe. She was brutally assaulted before and after the robbery, as a result of which she sustained the following injuries: she had a swollen face; her bottom teeth became loose; she had a laceration on the lip; her forearms and thighs were tender. The complainant was threatened that she would be stabbed with a screwdriver. At the time of her testimony she still suffered severe psychological trauma. The appellants at no stage showed any remorse.

[14] Counsel for the appellants argued that notwithstanding all these aggravating circumstances the rape committed by the appellants was not the worst kind of rape. As authority for this view, she relied on a number of

⁵ 1996(2) SACR 181(C) at 186e.

⁶ In S v Chapman 1997 (2) SACR 3 (SCA) at 5e.

judgments of the Supreme Court of Appeal which held that life imprisonment must be reserved for rapes falling into the category of the worst kind of rapes⁷. I agree that there are bound to be differences in the degree of seriousness of rapes. I do not understand these authorities to suggest that life imprisonment should never be imposed if more horrendous rapes than the one committed by the accused persons are imaginable. I am of the view that where, on the particular set of facts, life imprisonment is proportionate to the gravity of the particular offence, then it ought to be imposed. I am fortified in this view by the remarks made by the court in S v Vilakazi⁸, where it stated that “[t]here comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more.” I have no doubt that this is indeed a case where life imprisonment is proportionate to the crime committed.

[15] Counsel for the appellants made much of the appellants’ youthfulness, particularly that of Appellant 2. The appellants’ youthfulness cannot be considered in isolation. Both appellants made critical decisions during the commission of the offences; while appellant 1 played a leading role in respect of count 1, appellant 2 played a leading role in count 2, having suggested that they should be content with the complainant’s cellular phone despite having not found any money. Both appellants had serious previous convictions for which custodial sentence had been imposed. Against this background and without any evidence having been adduced to show their alleged immaturity, there is no basis for finding that the commission of their offences could have been influenced by their immaturity on account of their youthfulness.

[16] Turning to the contention that the court *a quo* did not take the time spent by the appellants in custody into account, I acknowledge that the period spent in custody while awaiting trial is one of the factors to be taken into account when determining the appropriate sentence. The circumstances which led to the accused persons spending time in custody while awaiting trial

⁷ See *S v Abrahams* 2002 (1) SACR 116 (SCA); *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

⁸ 2009 (1) SACR (SCA) 552 at para 54.

are also an important consideration.⁹ It must be borne in mind that appellant 1 in his evidence alluded to the fact that he was in custody in respect of two other matters unrelated to the incident involving the present complainant and that he was released from custody after his acquittal in those matters. His trial in respect of the present charges was concluded within a month of the date on which he was re-arrested. The rest of the period he spent in custody while awaiting other trials need not be taken into consideration for purposes of the matter at hand.

[17] With regards to appellant no 2, it is common cause that his correctional supervision was withdrawn due to his failure to comply with its conditions. The exchange on p 167 of the record is instructive:

"Mr Nel: Did you breach any parole conditions and then you were re-arrested?

Appellant 2: Yes

Mr Nel: Until when do you have to be in custody in Kroonstad?

Appellant 2: Until the year 2013"

It is therefore clear that the reason Appellant 2's incarceration for the duration of the trial cannot be attributed to this particular case as he was in custody as a result of the withdrawal of his parole. As the evidence showed, he was in any event already in custody in respect of another charge when he was linked by DNA to the complainant's rape. I am of the view that under these circumstances, the fact that the court *a quo* did not expressly deal with the appellants' incarceration for the duration of the trial is inconsequential.

⁹ In S v Radebe 2013 (2) SACR 165 (SCA) the court *a quo* had granted leave to appeal against sentence on the basis that it had not taken account of the two and a half year period spent in detention awaiting trial. The Supreme Court of Appeal warned against applying a mechanical formula in the consideration of the extent to which the period spent in detention pre-sentencing may have a bearing on the determination of an appropriate sentence. It considered a better approach to be one that took cognizance of the fact that such detention period is but one of the factors that should be taken into account when determining whether the effective period of imprisonment to be imposed is justified. It found that "the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentence, is a just one." Having considered all the circumstances, including the trial court's finding that part of the delay was as a result of the accused persons' own conduct during the course of the trial, that court found that the prescribed minimum sentence was justified and dismissed the appeal.

[18] Counsel for the appellant argued that the appellants' personal circumstances, cumulatively viewed constitute substantial and compelling circumstances that warrant a deviation from the applicable minimum sentence of life imprisonment. I disagree with this contention because it is clear that the mitigating factors are substantially outweighed by the aggravating factors attendant on the crime committed. In S v Vilakazi¹⁰ the court stated as follows: "In the case of serious crime the personal circumstances of the offender will by themselves recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment are in themselves largely immaterial to what the period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided." I align myself with these sentiments. The court correctly found that there were no substantial and compelling circumstances in respect of count 1. Furthermore, the conspectus of the record reveals that the sentence of life imprisonment is not disproportionate to the crime committed. I cannot find any error or misdirection in the reasoning of the court *a quo* in regard to the sentence imposed. There is therefore no reason to interfere with the sentence it imposed in respect of count 1.

[19] With regards to the robbery conviction, it is common cause that there is no applicable minimum sentence in respect of this offence. It is also common cause that the only item stolen during the robbery is a cellular phone of unknown value. It is clear from the record that the court *a quo* was alive to these aspects. The question is whether the appellants' counsel is correct in her submission that the ten year imprisonment sentence imposed in respect of this charge induces a sense of shock. It is apposite to refer to the case of S v Malgas¹¹, where the court stated as follows on this aspect: "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it

¹⁰ Supra at para 58

¹¹ Supra at para 12

were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. *However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.*" (My emphasis).

[20] In assessing whether the difference in the sentence imposed by the trial court and that considered appropriate by the appeal court is substantial, it is permissible to consider the sentences imposed by other courts in comparable circumstances but being mindful of the fact that every case must be decided on its own facts¹². There are many decided cases with similar facts but it is not necessary to overburden the judgment by embarking on a lengthy discussion of these cases. It seems to me that the average sentence where circumstances bear similarities to the present is four to five years imprisonment. The sentence imposed is twice as long as the going rate. In my view, a difference of that magnitude is substantial enough to warrant interference with the imposed sentence. Under such circumstances this court, as the court of appeal, is at large to interfere with the sentence imposed by the court *a quo*. Sentence in respect of count 2 will therefore be considered afresh.

[21] The well-known triad of sentence, namely the nature of the offence, the personal circumstances of the appellants and the interests of society¹³ have already been canvassed earlier in this judgment. I have taken into account that the main aggravating factors in the case at hand are the prevalence of the offence and the fact that both appellants have related previous convictions.

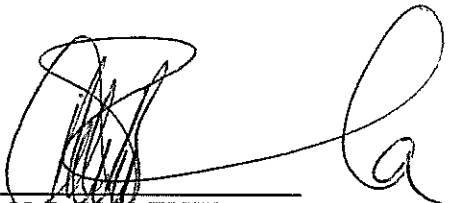
¹² S v Malgas (*supra*) at para 21.

¹³ R v Zinn 1946 AD 346.

Having taken all the principles applicable to sentencing into account, I am of the view that the appropriate sentence in respect of count 2 is five years' imprisonment.

[12] In the result, the following order is given:

1. The appellants' appeal against sentence in respect of count 1 fails and the sentence of life imprisonment is confirmed.
2. The appeal against sentence in respect of count 2 succeeds in respect of both appellants. The sentence of 10 years' imprisonment imposed by the court *a quo* is set aside and is replaced with the following: 5 years' imprisonment.
3. The sentence in respect of count 2 is antedated to 18 August 2011 and is to run concurrently with the sentence in respect of count 1.


 M.B. MOLEMELA, JP

I concur.


 C. VAN ZYL, J

I concur.


 A.P. JORDAAN, J

On behalf of appellants:

Adv. P.W. Nel
 Instructed by:
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On behalf of respondent:

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