



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A29/2015

In the matter between:

DANIEL PATRICK THAMAE

Appellant

and

THE STATE

Respondent

CORAM: DAFFUE, J, MATHEBULA, AJ *et* MOLITSOANE, AJ

HEARD ON: **12 SEPTEMBER 2016**

JUDGMENT BY: MOLITSOANE, AJ

DELIVERED ON: 20 OCTOBER 2016

- [1] The appellant was convicted and sentenced on two counts of housebreaking with intent to rape and rape (contravention of section 3 of the Sexual Offences and Related Matters Amendment Act, 32 of 2007) and a further count of rape, contravention of section 3 of Act 32 of 2007.
- [2] He is, however, appealing against the sentences in the two counts of housebreaking with intent to rape only, i.e. counts 1 and 3. Though he did not appeal the conviction and sentence in count 2 i.e. rape, upon reading of the record we were not entirely satisfied that he was indeed guilty of this offence and as a result we invited both counsel to address us in this respect.
- [3] In this respect we are greatly indebted to Adv. Mthetwa on behalf of the State and Adv. Kruger on behalf of the appellant who ably presented their arguments in this regard at short notice. I will return to count 2 later.
- [4] The ground on which the appellant appeals is set out as follows in his notice of appeal:
- “The above Honourable court erred in sentencing the appellant in counts 1 and 3 to sentences far more than the prescribed minimum sentence of 10 years where the court has found that substantial and compelling circumstances exist.”
- [5] It is trite law that a court of appeal will only in limited circumstances interfere with a sentence. Sentencing is pre-eminently the terrain of the trial court.

- [6] The court in **S v Malgas** 2001 (1) SACR 409 (SCA) set out the test as follows:

“The test for interference with sentences on appeal were evolved in order to avoid subverting basic principles that are fundamental in our law of criminal procedure, namely, that the imposition of sentence is the prerogative of the trial court for good reason and that it is not for appellate court to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised.”

- [7] The crux of this appeal is whether the court *a quo*, where it found that compelling and substantial circumstances existed, would impose a sentence which exceed a prescribed minimum sentence.

- [8] Section 51(2)(b)(i) of the Criminal Law Amendment Act 105 of 1997 (Act on Minimum Sentences) provides as follows:

“Notwithstanding any other law but subject to subsection (3) and (6), a regional court or a High shall sentence a person who has been convicted of an offence referred to in Part III of schedule 2, in the case of (i) a first offender to imprisonment for a period of not less than 10 years...”

Subsection 3 (a) of the said Act provides further that –

“If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter those circumstances on the record

of the proceedings and must thereupon impose such lesser sentence ...”

[9] A careful reading of the record, especially the application for leave to appeal proceedings, will reveal that the court *a quo* found that substantial and compelling circumstances existed herein which warranted a departure from imposing the prescribed minimum sentence of 10 years imprisonment in respect of counts 1 and 3.

[10] A further careful reading of the judgment of the court *a quo* reveals that the said court did not minute the factors it found to have constituted substantial and compelling to warrant it to deviate from a prescribed minimum sentence of 10 years imprisonment.

[11] In my view, section 51(3) (a) of the Act on Minimum Sentences imposes two peremptory duties on the court where substantial and compelling circumstances are found to be present:

- (i) firstly, the court is obliged to “enter those circumstances on record of the proceedings, “and
- (ii) secondly, it must impose such a lesser sentence it deems fit.

[12] Quiet apart from the obligations imposed by this section, it is also in keeping with the duty of the court to keep a proper record of the proceedings and also to furnish reasons for the decisions taken.

- [13] Kgoele J in the unreported case of Isaac Kukutsi Metsing and State CA 54/2014 NWHC quoted with approval the unreported case of Dial v S (A141/2012) [2014] ZAFSHC 79 (12 June 2014):

“I am not persuaded that the failure of the trial judge to record reasons that persuaded him to sharpen the punishment over and above the prescribed minimum sentence constituted misdirection so material as to justify appellant interference. Where a judge, in the exercise of his or her discretion, decrementally deviates from the prescribed minimum sentence, he or she is required to record his reasons for such deviation. However, where a judge in the exercise of his discretion deems it appropriate to deviate from the prescribed minimum sentence by imposing a sentence in excess of that statutory margin he or she is not obliged to give reasons. It is perhaps desirable but certainly not peremptory to do so.”

- [14] Clearly in this case, the court did not enter the substantial and compelling circumstances it found to have existed on record, and it is therefore difficult to see which factors the trial court took in coming to the conclusion that they were present.
- [15] It needs to be mentioned, however, that the state also accepted that compelling and substantial circumstances herein existed.
- [16] In the absence of any evidence or submissions to the contrary, I am therefore prepared to accept that, notwithstanding that such substantial and compelling circumstances have not been recorded, they do exist in this case.

- [17] The court is, therefore, obliged to deviate from imposing a prescribed minimum sentence upon a finding that compelling and substantial circumstances exist. It has no choice but it must impose a lesser sentence than the sentence prescribed. It stands to reason, therefore, that it cannot impose a sentence higher than the minimum sentence prescribed.
- [18] The court *a quo* was therefore obliged to impose a lesser sentence having found that compelling and substantial circumstances existed.
- [19] It therefore committed a misdirection when it imposed a sentence far exceeding the prescribed minimum sentence thus entitling this court to interfere.
- [20] As alluded earlier, the charges of rape for which the accused have been convicted of, fall within the provisions of section 51 of the Act on Minimum Sentences. The minimum prescribed sentence for such offences is 10 years imprisonment unless the court found substantial and compelling circumstances existed.
- [21] It is trite that when imposing sentence the court must take into account the seriousness of the offence, the interest of society, as well as the personal circumstances of the accused – See Zinn 1969 (2) SA 537A.
- [22] In S v SMM 2013 (2) SACR (SCA) 292 at 297 par (a) to (b) court had this to say:

“....it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment, must always, fit the crime, the criminal and the circumstances of the case.”

[23] Accused is 26 years of age and stays with a girlfriend. He has a child of less than two years of age. The child stays with the mother. He is currently not maintaining the child. He did Grade 8 at school. He stays with his grandparents and his mother and four other siblings. The grandparents receive a pension grant and one sibling receives a disability grant.

[24] The accused has been convicted of very serious offences. In **S v Ncheche** 2005 (2) SACR 386 (W) the court had this to say:

“Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely.”

[25] While rapists should be severely punished, sight should not be lost of the fact that mercy also, is an element of punishment and it must also be taken into account.

- [26] The personal circumstances of the accused must be weighed together with the following aggravating factors. In both counts the victims were sleeping in the comfort of their homes when the accused violated their privacy and further violated their bodies by raping them.
- [27] The preamble to the Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007, *inter alia*, acknowledges that “the commission of sexual offences in the Republic is of great concern, as it has particularly disadvantageous impact on vulnerable persons, the society as a whole and the community ...”
- [28] Courts, therefore, have a duty to impose sentences which will serve as deterrence, not only to the accused but to the general public out there, that acts of this nature will not be countenanced. It is for these reasons that I find that in order to balance the personal circumstances of the accused against the seriousness of the offence and the interest of society that the sentences as set out below to be appropriate.
- [29] In conclusion, I alluded above that with regard to count 2 we had requested counsel to address us on their views regarding the conviction on that count.
- [30] It must be noted that no appeal was lodged by the accused against his conviction or sentence in respect of count 2. While we requested counsel to address us in this regard, we never requested counsel to address us on the issue whether it would be appropriate that we should *mero motu* deal with the appeal in the

absence of the appeal being formerly lodged. I will therefore not interfere with the conviction and sentence in count 2.

[31] I am of the view that this question may duly be dealt with in another court in the event of a further appeal and where proper heads of argument are before court and I consequently believe that at least at this stage it will not be proper to deal with this issue where no formal appeal is pending.

[32] The effective sentence imposed by the Court *a quo* in respect of count 2 is 15 years imprisonment. I intend to substitute the imposed sentences with the sentences of 8 years imprisonment each in respect of counts 1 and 3.

[33] If the sentences are not ordered to run concurrently, it would mean that the appellant would have to serve 31 years imprisonment. This would not be an appropriate result and would be unnecessarily long. The order to be granted herein will reflect the mercy shown to appellant, but simultaneously indicate the seriousness of the offences.

[34] I consequently make the following order:

1. The appeal against the sentences in respect of counts 1 and 3 is upheld.
2. The sentences imposed by the court *a quo* in respect of counts 1 and 3 are set aside and substituted with the following:

Count 1: 8 years imprisonment;

Count 3: 8 years imprisonment.

3. 5 years each in respect of the sentences of counts 1 and 3 shall run concurrently with the sentence of 15 years imprisonment imposed in count 2.
4. The appellant is therefore sentenced to an effective term of imprisonment of 21 years.
5. The sentences are ante-dated to 28 January 2015.

PE MOLITSOANE, AJ

I concur

JP DAFFUE, J

I concur

A MATHEBULA, AJ

On behalf of appellant:	Adv. S Kruger
Instructed by:	Bloemfontein Justice Centre Bloemfontein

On behalf of respondent:	Adv. S Mthetwa
Instructed by:	Office of the Director: Public Prosecutions Bloemfontein