

IN THE HIGH COURT OF SOUTH AFRICA

Not Reportable

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 129/08

Heard on: 29/07/16

Delivered on: 30/08/16

In the matter between:

SITHEMBELE MGANDELA

Appellant

and

THE STATE

Respondent

Coram : Nhlangulela DJP; Dawood J; Griffiths J

JUDGMENT

NHLANGULELA DJP:

[1] The appellant was arraigned in this court on a charge of raping a 7 year old girl, of which he was convicted and sentenced to undergo life imprisonment. He

now appeals against sentence, with leave to do so having been granted by a single judge.

[2] The appellant was 47 years old at the time of committing rape. The facts proved against him were briefly that in the morning of 12 August 2006 and at Slovo Park, Mthatha, G. D., the complainant, and her elder sister, S., left their home in company of the appellant to fetch traditional beer from the house of the appellant on behalf of her father. Upon reaching the bedroom of the appellant he poured beer into a five litre container, and pretending to hand over the container to S., but instead grabbed hold of her arm. However, S. freed herself from the appellant's grip and ran out of the bedroom, leaving the complainant inside together with the appellant. When she reached the exit gate of the appellant's premises it dawned in her that the complainant was still in the bedroom together with the appellant. She returned to the bedroom, pushed open the door and re-entered. In so doing she saw the appellant lying on top of the complainant on the mattress with his pants pulled down having sexual intercourse with the complainant. The complainant confirmed that the appellant had sexual intercourse with her without her consent. Medical evidence adduced confirmed that sexual penetration did occur.

[3] The appeal is being prosecuted on the broad ground that the sentencing court ignored the personal circumstances of the appellant, and over-emphasized the seriousness of the offence and interest(s) of society at the expense of the personal circumstances. On appeal before us it was argued strenuously that the sentencing court *erred* as the personal circumstances of the appellant taken cumulatively constitute substantial and compelling circumstances in terms of s 51 (3) of the Criminal Law Amendment Act 105 of 1997 (the Act) warranting imposition of a sentence lesser than life imprisonment ordained in s 51 (1) of the Act.

[4] It was pressed in argument on behalf of the appellant that the personal circumstances that the sentencing court ought to have taken into account are these: the appellant is a first offender; he was 47 years when he committed the offence; the appellant is married and having three minor children; the children are still attending school; he supports and maintains his wife and children with income derived from casual jobs. To these factors the sentencing court raised the following question during argument: “But those sort of factors that would ordinarily receive greater recognition in circumstances where the court has to consider whether the accused should be afforded the option of a fine, do they not pale in some sort of insignificance if one accepts that imprisonment and long term imprisonment ... is imperatively called for.” In this court counsel for the appellant

submitted that the statement that the personal circumstances pale into insignificance was a declared intention on the part of the court to exclude the personal circumstances of the appellant from the enquiry whether substantial and compelling circumstances are present in the case. It was submitted further that the sentencing court failed to apply the *dictum* in *S v Malgas* 2001 (1) SACR 469 (SCA) at 48c that in sentencing under s 51 (1) of the Act all factors traditionally taken into account in sentencing, such as, *inter alia*, the personal circumstances of the accused, continue to play a role in the determination of an appropriate sentence.

[5] As a court of appeal dealing with sentence we must heed the injunction of the Supreme Court of Appeal in *S v Malgas* at 478d – h, which reads:

“A court exercising appellate jurisdiction cannot, in the above situation, 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 were a court of first instance and 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”.

[6] The thrust of the submission advanced on behalf of the appellant is that the sentencing court committed a misdirection. In our view it did not. The court *a quo* had anxious consideration to the personal circumstances of the appellant against the backdrop of the heinousness of the offence of rape committed by the appellant against a child. It recognized the principle of law stated in the case of *S v Sobandla* 1992 (2) SACR 613 (A) at 615 that the sentencing court must assess the triad of factors in a balanced manner, and being mindful that the personal circumstances must not be sacrificed at the altar of deterrence. It took into account the principle stated in *S v Rabie* 1975 (4) SA 855 (A) at 866b that it is in the public interest that punishment should be meted out fairly without excessiveness which would make it appear merciless. And above all, it recognised the obligation thrust upon it in terms of s 51 (1) of the Act that in a case such as the present, imposition

of a sentence of life imprisonment is mandatory. It is a sentence that is ordinarily appropriate and not to be deviated from unless substantial and compelling circumstances are shown to exist.

[7] The approach adopted by the court *a quo* is in keeping with the manner in which a court sentencing under s 51 (1) of the Act exercises discretion. That approach was stated by our Full Court in *S v Nkawu* 2009 (2) SACR 402 (ECG) as follows at 404, paras. [3] – [4]:

“[3] ... when sentencing for crimes specified in the Act, a court is required to ‘approach that question conscious of the fact that the legislature has ordained life imprisonment as the sentence which should *ordinarily* be imposed ...’ While the Act shifted the emphasis to ‘the objective gravity of the type of crime and the public’s need for effective sanctions against it’, discretion to deviate from the prescribed sentence was granted to courts ‘in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may’” (cf *S v Malgas* at 476 para. [8])

[4] A court may deviate from the sentences prescribed if ‘substantial and compelling circumstances’ are present. In *Malgas*, at para 9, it was held that it is impermissible to deviate from the prescribed sentence ‘lightly and for flimsy reasons

which could not withstand scrutiny’. Apart from this, however, all factors relevant to determining sentence remain relevant when the Act applies and a sentencing court must look to the ‘ultimate cumulative impact’ of all of these factors in order to determine whether a departure from the prescribed sentence is justified”.

[8] In dealing with the question whether substantial and compelling circumstances exist which require imposition of a sentence lesser than life imprisonment the sentencing court had to interrogate not just the personal circumstances of the appellant but also the severity of the offence of rape, the tender age of the complainant, and the complainant is suffering from psychological and emotional harm due to the adverse effects the rape has had on her child. It had regard to a plethora of decided cases in which it was held that the offence of rape is a humiliating, degrading and a brutal invasion of the privacy and the dignity of the person of the complainant: *S v Chapman* 1997 (2) SACR 2 (SCA) at 5 (b); and that it is an appalling and utterly outrageous crime and inflicting terrible and horrific suffering and outrage on the complainant and her family (*S v Ncheche* 2005 (2) SACR 386 (WLD) at 395, para. [35]. A similar attitude is expressed in *S v PB* 2001 (1) SACR 448 (SCA) at 453, para. [16] where it was stated (with

reference to *S v Jansen* 1999 (2) SACR 368 (C) at 378g-379g) that rape of a child is an appalling and perverse abuse of male power.

[9] In line with a newly developed jurisprudence in *S v PB, supra*, post the majority court decision in *S v Nkomo* 2007 (2) SACR 198 (SCA), the sentencing court found that the psychological and emotional harm suffered by the complainant is an aggravating factor which is not less than the harm caused by significant physical injuries sustained by victims in other cases of rape. That jurisprudence found resonance in the cases decided by our Full Court in *Siyabulela Tonisi v The State*, ECG Case No. CA & R 144/2011 dated 23 April 2012 and *Masixole Malinge v The State*, ECB Case No. CA & R 10/2014 dated 25 November 2014.

[10] The sentencing court came to a conclusion, correctly so in our view, that substantial and compelling circumstances do not exist in this case. That decision came after considering the personal circumstances of the appellant as well as that he was old enough to be a father figure towards the child, but who betrayed his position of trust by raping instead of protecting the complainant. He selfishly exploited the vulnerability of the complainant to satisfy his sexual lust. And at worst, the appellant failed to show remorse for his shameful and despicable conduct. That court saw it fit to impose a custodial sentence that would express the revulsion of all law-abiding citizens at the aggravated nature of the offence

coupled with its prevalence in society. In coming to that decision the court realized that a mandatory sentence of life imprisonment as provided for in s 51 (1) of the Act must be imposed. The cases of *S v Malgas* at 476; *S v PB* at 451; *S v Matyityi* 2011 (1) SACR 40 (SCA) at 53; *DPP KwaZulu-Natal v Ngcobo And Others* 2009 (2) SA 361 (SCA) at 367a-c; *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 561 support the statutory injunction to the sentencing courts that in the absence of substantial and compelling circumstances the act of raping a child must be punished by a sentence of life imprisonment.

[11] With the appellant having failed to show penitence for his unlawful deed, the sentencing court found that there were no reasonable prospects of him being rehabilitated. The appellant did not ask for an apology from the complainant, her parents, her community or the court. He did not tell the court why he raped the complainant. In the circumstances we cannot fault the sentencing court's conclusion on the issue of rehabilitation. It now remains a task for the prison officials to explore the issue for the benefit of the appellant as it is plain that the appellant is as yet to gain insight into the wrongfulness of his actions.

[12] We agree with counsel for the respondent that there is no merit in this appeal. Neither did counsel for the appellant succeed in persuading us that the

imposed sentence for what is undeniably an aggravated rape is unjust in any manner or form. In *S v Rabie* 1975 (4) SA 855 (A) Holmes JA stated appositely as follows at 862 G:

“Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.”

In this case it cannot be said that the sentence of life imprisonment is disproportionate to the circumstances of the appellant, the nature of the offence and the societal need to stamp out violent crimes.

[12] In the absence of reasons to interfere with the discretion of the sentencing court the only order to make is the following:

“The appeal against sentence of life imprisonment is dismissed.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Dawood J

I agree:

F.B.A. DAWOOD

JUDGE OF THE HIGH COURT

Griffiths J

I agree:

R. GRIFFITHS

JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv. W.K.M. Gxaba
	:	c/o Legal Aid Board
		MTHATHA.

Counsel for the respondent	:	Adv. L. Mtengwana
	:	c/o Director of Public Prosecutions
		MTHATHA.

