



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: A17/2014

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
 (2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
 (3) REVISED ✓

DATE

SIGNATURE

PP *Mohlammoneyane*

17/3/2015

In the matter between:

SIFISO JOSHUA KHOZA

Appellant

and

THE STATE

Respondent

JUDGMENT

MOHLAMONYANE AJ:

- [1] The Appellant, Mr Sifiso Joshua Khoza, was arraigned in the Regional Court for the Regional Division of Gauteng, held at Benoni. The Appellant was charged with and convicted of four

counts of rape emanating from an incident in which he raped one Ms Nomvula Langa, on the night of 25 December 2011 at Mogoba village, Putfontein, near Benoni.

- [2] The Appellant was sentenced to life imprisonment on 12 February 2013, leave to appeal against sentence only having been granted by the learned Regional Court Magistrate on 26 May 2013.
- [3] Accordingly, this is an appeal by the Appellant against sentence only.
- [4] It is significant to note that the four counts of rape of which the Appellant has been convicted related to four different continual instances of having sexual relations with the complainant in one night, in one single conduct. The single conduct comprised of the first instance of sexual intercourse where the Appellant had put on a condom, the second one without a condom, the third with a condom and the fourth without a condom.
- [5] The personal circumstances of the Appellant, as they appear on record were that he was twenty-five (25) years old, married and had one minor child aged three (3) years. He was staying with his mother and father at the time of the commission of the offence. He had been employed at a construction company. The Appellant had lost his child who died and his wife left him. He was a first offender. He had been in custody for a year and three months at the time he was sentenced and was as a result unable to bury his child. I can mention that at the present moment he has been in custody for at least three (3) years.

- [6] In aggravation, it was argued on behalf of the Respondent in the heads of argument and before us that the sentence imposed cannot be seen as shockingly inappropriate. The grounds upon which counsel for the Respondent relied were (a) the Appellant attacked and raped a defenceless woman who was locked in a house for several hours; (b) the victim was forcefully taken away from her boyfriend and (c) the victim was assaulted and forcefully hauled to the house in which the sexual act took place. It was further argued by counsel for the Respondent that the gravity of the crime and aggravating features (as stated above) as well as the societal requirements far outweighed the personal circumstances of the Appellant.
- [7] After an extensive analysis of the aggravating and mitigating factors, the Court *a quo* came to the conclusion that there were no substantial and compelling circumstances warranting imposition of a sentence other than life imprisonment.
- [8] To this day the triad, propounded in *S v Zinn*, 1969 (2) SA 537 (A) at 540, is still apposite. As stated in Zinn's case, the sentence to be imposed must fit the crime, the offender and the interests of society.
- [9] The Appellant had been charged subject to section 51 and Schedule 2 of Part 1 of the Criminal Law Amendment Act, no 105 of 1977. The question that arises in this appeal is: what is an appropriate sentence regard being had to all the relevant circumstances of this case. In *S v Blaauw* [2001] 3 All SA 588 (C) Van Heerden J, aptly summed up the situation (regarding section 51) by stating that the sentence had to fulfil all the objectives of sentencing, which are (a) the prevention of similar crimes, (b) deterring other offenders, (c) the rehabilitation of the accused

person and (d) compensation for the offence. The Court further stated that the objectives must be achieved by a balanced weighing up of different factors such as the personal circumstances of the Appellant, the nature and seriousness of the crime and the interests of society. The Court added that the interests of the victim are also a critical factor to be considered.

[10] The Judge in Blaauw's case *supra*, followed *S v Malgas*, 2001(1) SACR 469 par. [25] A that section 51 has limited but not eliminated the court's discretion in imposing sentence in respect of offences affected by the section. It was furthermore held that the approach of the courts should be that life imprisonment should ordinarily be imposed for the relevant offences, unless weighty justification exists to warrant departure from that rule. (also *Ncheche v S*, [2005] JOL 13886 (W)). The case of *Ncheche* concerned a "*double rape*". The Appellant and another had taken turns to rape the complainant. I will later return to the issue of "*double rape*".

[11] The guiding principle in an appeal against sentence was laid down by Holmes JA (as he then was) in *S v Rabie* 1975 (4) SA 855 A, at 857, where the learned Judge stated:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence

should only be altered if the discretion has not been “judicially and properly exercised”.

2. *The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate”.*

- [12] On behalf of the Appellant, in heads of argument, a case cited as S v Mafunya (sic) to be read as Mafuya, 1972 (4) SA 565 (O.P.A) was referred to insofar as it supported the principle that first offenders should generally, “...*not lightly be sent to jail*”. I must hasten to state that the Mafuya decision is irrelevant to the present case and inapplicable. The case involved a first offender convicted of a minor offence of common assault.
- [13] The seriousness of and heinous nature of the crime of rape need not be over-emphasized. [S v Chapman 1997 (3) SA 341 (SCA)].
- [14] The Appellant was charged with rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, no 32 of 2007, in that it was alleged in the charge-sheet that he had committed four counts of rape, all in one night.
- [15] The facts in this appeal should be distinguishable from the facts in the Ncheche case, *supra*, where two accused persons had raped the complainant, which the Court referred to as “*double rape*”. In Zinn, the Appellant was convicted of, *inter alia*, 14 counts of fraud and 221 counts of theft. The Appellate Division (as it then was), in Zinn's case, regarded all the crimes committed by the Appellant “...*as one course of conduct for purposes of sentence*”.

- [16] In my view, the Court *a quo* over-emphasized the seriousness of the crime and the prevalence thereof in South Africa to the detriment of the Appellant. It has been noted that there is no question about the seriousness of the crime of rape. However, the learned Magistrate ought to have found, for purposes of sentence, that the Appellant committed the four counts of rape with one single course of conduct over a single night.
- [17] *“E. The Legislature has ... deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored”.* [Per Marais JA (as he then was) in *Malgas, supra* at 482 b].
- [18] In the result I find that the learned Magistrate had over-emphasized the needs of the society in imposing a sentence of life imprisonment, which in itself, is disproportionate with the circumstances of the case. At age 25, the Appellant is not beyond rehabilitation, or at least, it has not been shown in evidence that he is beyond any measure of rehabilitation. The learned Magistrate ought to have found that that fact was a substantial and compelling circumstance warranting imposition of a lesser sentence than the prescribed one. [*S v Marais*, 2009 (1) SACR 299 ECD, at 302 f-h, par. 5].
- [19] Having said that however, counsel for the Appellant conceded in his heads of argument and before us as well that an alternative lengthy term of imprisonment would be appropriate. In this regard the comment of Nugent JA, in *S v Vilakazi*, 2009 (1) SACR 552 (SCA) at 574, par. 58, are apposite:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily 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 that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character”.

[20] In light of the foregoing exposition, the appeal against sentence ought to succeed.

[21] It is on record that during the address in mitigation of sentence, the Appellant's attorney submitted that the Appellant should be declared unfit to possess a firearm in accordance with the provisions of section 103 of the Firearms Control Act, no 60 of 2000. However, I was unable to find, on record, that the learned Magistrate had done so.

[22] In the result, I make the following order:

22.1 The appeal against sentence succeeds.

22.2 The sentence of life imprisonment is set aside and replaced with the following:

"Accused is sentenced to 24 years' imprisonment".

22.3 In terms of section 282 of the Criminal Procedure Act, no 51 of 1977, the sentence of 24 years' imprisonment is antedated (backdated) to 12 February 2013.

22.4 The Appellant is declared unfit to possess a firearm in terms of the provisions of section 103 (1) (g) of the Firearms Control Act, no 60 of 2000.



MD MOHLAMONYANE

[Acting Judge of the High Court of
South Africa,
Gauteng Division, Pretoria]

I concur,



M. H.E. ISMAIL

[Judge of the High Court of
South Africa,
Gauteng Division, Pretoria]