

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	☒ YES / ☐ NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	☒ YES / ☐ NO.
(3) REVISED.	☒ YES / ☐ NO.
17/3/2015.	
<u>DATE</u>	<u>SIGNATURE</u>

17/3/2015

Case Number: A469/2013

In the matter between:

MOHAU DANIEL TLADI (GLADI)

1st Appellant

MPHO MTJALI

2nd Appellant

SAMUEL RAMAELE

3rd Appellant

and

THE STATE

Respondent

JUDGMENT

POTTERILL J

- [1] The three appellants were convicted on one count of kidnapping and one count of rape each. In respect of count 1 all the appellants were sentenced to four years imprisonment. In respect of count 2 the first and third appellants were sentenced to 15 years imprisonment, whilst the second appellant was sentenced to 5 years imprisonment. Leave to appeal against their convictions and sentences were refused by the court *a quo*. On petition all three appellants were granted leave to appeal against both conviction and sentence.
- [2] The matter was previously postponed to reconstruct or complete the record of the proceedings. At a further hearing the matter was postponed for the appellants to furnish reasons to the court why their sentences should not be increased; *S v Bogaards* 2013 (1) SACR 1 (CC). Pursuant thereto the appellants filed affidavits wherein they stated that they did not want to pursue the appeal and had in fact terminated their counsel's mandate to act in the appeal. It is however trite that once courts give notice that there would be a possible increase of a sentence the appellants cannot withdraw their appeal without permission of the court of appeal; *S v Kirsten* 1988 (1) SA 415 (A).
- [3] For purposes of this appeal the appellants have conceded that the convictions are in fact and law correct and that they no longer seek to appeal against the convictions.

I am satisfied that the court *a quo* did not err in finding the appellants guilty on both counts.

[4] The state has not requested that the sentences on count 1 be increased. The respondent has however submitted that the sentences of all three appellants on count 2 is shockingly inappropriate and should be set aside and replaced with other sentences.

[5] The appellants kidnapped the complainant and raped her in total six times. In *S v Chapman* 1997 (2) SACR 3 (SCA) at 5b-c raped was described in these terms:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

Furthermore in *N v T 1994 (1) SA 862 (C)* at 864G rape was described as:

"Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims."

- [6] The offences committed are indeed horrific. On 30 July 2010 the complainant was enjoying an evening with her boyfriend at a tavern after he had travelled all the way from Mpumalanga to spend some time with her. Appellant 1 physically fought with her boyfriend to obtain control of the complainant. Appellants 2 and 3 deviously offered the victim assistance by running away with her while full well knowing that it was done in stealth just to later meet up with appellant 1 and so doing to execute their plan. They took her to a shack where appellant 3 raped the victim. Thereafter appellant number 2 covered his penis with an empty packet of Simba chips, which he utilised as a homemade condom, to rape her. Appellant 3 again raped the victim. Appellants 2 and 3 ran away upon hearing a police siren and appellant 1 took her to a house where he raped her three times. During this horrific ordeal the victim was begging them not to kill her. The probation officer reported that the victim informed her that she is enduring unbearable physical pain emanating from her vagina. She has lost her appetite and experiences nightmares. She has lost her trust and faith in people and especially men. Her sister confirmed that the offences had affected her sister in that she stubbornly will not go anywhere alone

even if so instructed. A worse ordeal cannot be imagined and the circumstances of this rape justify a sentence of life imprisonment.

[7] In addressing the needs of society the Minimum Sentence Act was promulgated to address specifically rape in this country. A court should thus not likely deviate from the minimum prescribed sentence unless there are compelling and substantial circumstances. Society urges the court to address these brutal crimes with a minimum sentence. The imposition of life imprisonment as prescribed would thus also address the needs of society; *S v Malgas* 2001 (1) SACR 469 (SCA) at 478d-g.

[8] The court must however also take cognisance of the personal circumstances of the offenders and must deviate from the prescribed minimum sentence if the sentences are disproportionate to the appellants.

[9] The court *a quo* took note of the fact that appellant 1 was 28 years old, had made Grade 10 at school and had fathered two children. He was unmarried and was unemployed at the time of the commission of the offences.

[10] Appellant 2 was 17 years and 11 months old at the time of the commission of the offence and was 19 years old when sentencing took place. He was doing odd jobs

prior to his arrest and had no dependents. He had obtained Grade 11 at school. He had a health problem i.e. a respiratory problem.

However the probation officer's report confirmed that the appellant was in good health. It further stated that he was a first offender and that he never knew his father and his mother had passed away. His older sister was looking out for him. The probation officer recommended direct imprisonment.

[11] Appellant number 3 was 20 years old at the time of sentencing. He had obtained Grade 10 and was performing odd jobs prior to his detention. He suffered from headaches.

[12] The court *a quo* found the following compelling and substantial circumstances pertaining to appellants 1 and 3:

12.1 They had been in custody for 1 year and 2 months.

12.2 Liquor played a role.

12.3 That appellant 3 was a first offender.

12.4 That first appellant had two children.

[13] As for appellant 2 the court in fact found it aggravating that the appellant had made a condom from a Simba packet rendering him very knowledgeable about the consequences of his action. The court also took cognisance as compelling and

substantial the fact that liquor played a role and that he had also been in custody for 1 year and 2 months. A further factor was that the second appellant was a first offender.

[14] Appellants 1 and 3 in their reasons as to why their sentences should not be increased set out the following facts:

- 14.1 They had already learnt from their incarceration;
- 14.2 They were misguided in their appeal by their fellow custodians;
- 14.3 They have had now accepted their convictions and sentences;
- 14.4 They are attending courses to make them better people;
- 14.5 The third appellant is now a priest and is preaching the word of God;
- 14.6 If their sentences were to be increased then they would not be able to obtain employment due to their age and they would be useless citizens in not being able to provide for their families.

[15] No reasons were forwarded as to why appellants 2's sentence should not be increased for the following reasons:

"Not because state did not mentioned him from the beginning, but because he gave his intention that he is fine with the findings of the court/trial court"

This was of course incorrect as the state had indicated that all three the appellants' sentences should be increased and the state had also in their heads referred to why appellant number 2's sentence should be increased.

[16] The court *a quo* was correct that the imposition of life imprisonment for appellant 2 would be bad in law and unjust. However no reasons were forwarded why there is the disparity between appellant number 2 and appellant 3's sentence. It must be noted that there is approximately one year's age difference between appellant number 2 and appellant number 3. In *S v Giannoulis* 1975 (4) SA 867 (A) in which the court was concerned with an appeal against sentence on the grounds of a disparity between the sentence imposed upon him and the sentence imposed upon a co-offender, Holmes JA said the following at 873F-H:

- “1. *In general, sentence is a matter for the discretion of the trial court. Disparity in the sentences imposed on participants in an offence (whether tried together or in separate courts) will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.*
2. *Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellant interference*

with the sentence may, depending on the circumstances, be warranted. The ground of interference would be that the sentence is disturbingly inappropriate.

3. *In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances."*

In *S v Monyane and Others* 2008 (1) SACR 543 (SCA) the court found that a court of appeal would only interfere where the degree of disparity between the sentence imposed by the trial court and the sentence the Appellate Court would have imposed was such that the interference was competent and required.

- [17] *In casu* I am satisfied that the degree of disparity between what the Court of Appeal would have imposed and what the trial court in fact imposed is such that interference is competent and required. I furthermore find that pertaining to appellant 2 the disparity between the sentences of appellant 2 and appellant 3 is disturbingly inappropriate.

- [18] In considering why the sentence should be increased the court takes cognisance of the following factors:

18.1 No reasons have been forwarded as to why the sentence of appellant 2 must not be increased.

18.2 As far as the offences are concerned, both appellants 2 and 3 gained the complainant's trust by offering to run away with her, only to abuse her. Although appellant 3 raped the complainant twice and appellant 2 raped the complainant only once, this does not render a 10 year disparity in sentence justified. In fact the actions of the second appellant was gross in utilising a Simba chips paper as a homemade condom. In fact the court *a quo* found that in doing so the second appellant was knowledgeable and in was in fact trying to save his own life with no dignity to the complainant. There were thus more or less equal degrees of participation of appellants 2 and 3.

[19] As far as the personal circumstances of appellants 2 and 3: both are young with only a year difference between the two. Both were in custody for the same period and both were first offenders. There are no personal circumstances warranting the disparity of 10 years in sentences.

[20] The court *a quo* did not motivate why he only imposed 5 years imprisonment versus 15 years on the third appellant. The magistrate was very aware that the second appellant could not be sentenced to life imprisonment, but that is not a factor not to impose 15 years on the same set of facts with the same personal circumstances as that of appellant 3. I am satisfied that 15 years imprisonment would be just and

proportionate to appellant 2 in view of his age and prospects of rehabilitation. This is furthermore so because the four years sentence was not ordered to run concurrently. The cumulative effect thereof is that appellant 2 would thus serve 19 years imprisonment.

[21] The question arises if appellant 3's sentence must be increased. The deviation from life imprisonment was indeed for flimsy reasons. Taking liquor is not a license to rape and is not a factor to be taken as compelling and substantial. The mere fact that he was a first offender also did not on its own or cumulatively with any other factor render the sentence of life imprisonment unjust. The age of the appellant and the fact that he can be rehabilitated are however compelling and substantial circumstances. The fact that the sentence on counts 1 and 2 were not ordered to run concurrently also has a cumulative effect. I am satisfied that 19 years for the offences are just towards the appellant.

[22] As for appellant 1 he was a mature adult at the time of the commission of the offences. He physically fought with the complainant's boyfriend to obtain control over the complainant. His co-accused finished raping the complainant and ran away due to a police siren. This did not bring him to his senses, in fact he took her to another home and raped her there. As the oldest of the three appellants he should have desisted with this horrifying crime, but he persisted and raped her three times. There is nothing in the personal circumstances of the appellant that renders life

imprisonment unjust. The fact that he had children is most certainly not compelling and substantial. The fact that he took liquor as set out above is not a compelling and substantial circumstance and the fact that he was an awaiting trial prisoner does not cumulatively with the other factors as set out above render life imprisonment unjust. I accordingly am satisfied that the first appellant's sentence must be increased to life imprisonment with count 1's sentence to run concurrently.

[23] I accordingly propose the following order:

23.1 Appellant 1's sentences are set aside and replaced with the following:

- "1. Count 1 – Four (4) years imprisonment to run concurrently with the sentence on count 2.
2. Count 2 – Life imprisonment."

23.2 Appellant 2's sentences are set aside and replaced with the following:

- "1. Count 1 – Four (4) years imprisonment.
2. Count 2 – Fifteen (15) years imprisonment.
3. The sentences are not to run concurrently."

23.3 With regard to appellant number 3 the sentences are not increased and the sentences are confirmed as:

- "1. Count 1 – Four (4) years imprisonment.
2. Count 2 – Fifteen (15) years imprisonment.
3. The sentences are not to run concurrently."


S. POTTERILL

JUDGE OF THE HIGH COURT

I agree


N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT

CASE NO: A469/13

HEARD ON: 13 March 2015

FOR THE APPELLANT: ADV. M.I. KOMAPE

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. F.W. VAN DER MERWE

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 17 March 2015