



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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
19/03/2015	
DATE	SIGNATURE

Case No. A34/2014

Date Heard: 09 March 2015

Date of judgment: 19/3/2015

In the matter between:

ZENGISA MALI

Appellant

and

THE STATE

Respondent

JUDGMENT

A.M.L. Phatudi J:

[1] The appellant was convicted of attempted robbery with aggravating circumstances and rape at Benoni regional court on 14 June 2013. On 26 July 2013 the appellant was sentenced to 5 years

on the attempted robbery with aggravating circumstances and life imprisonment on rape. The appellant appeals with leave of the trial court against the conviction and sentence.

[2] At the commencement of the hearing, Mr Moeng for the appellant was initially of the view that the evidence of the complainant in counts 1 and 2, of which the appellant was acquitted of, was of relevance to the findings of the guilty verdict in respect of which is the subject of this appeal. He, after our engagement thereto, conceded that such evidence was irrelevant vis-à-vis the grounds of appeal the appellant relies on. To summarise the said grounds, the appellant challenges the complainant's evidence in as far as it relates to his identification on the basis that it was not satisfactory. In short, he argues that it is a mistaken identity.

[3] The complainant, a 15 year old girl at the time, testified that in the afternoon of the 28 March 2012 at about 15h00, she was on her way home from school clad in school uniform when she noticed a man wearing a black and white golf shirt and grey pants following her. The man had a greyish cap on and was pushing a small dark blue bicycle with two tennis balls hanging on the front wheel. The said man, who was in the company of one of her school mate walked pass her. After a while, the said man returned approaching her from the front. He immediately grabbed her by her neck and pointed her with a knife. She immediately recalled an incident where one of the girls was killed. She asked him not to kill her.

[4] The appellant ordered her to behave herself and to comply with the orders given. She complied by handing over her school bag. The appellant emptied the bag in search for the cell phone but to no avail. He caused her to undress. He then forced her to kneel down where he penetrated her with his penis vaginally from behind and raped her. The uncontested J88 form which was accepted as evidence and handed up indicate that the Labia minora was 'swollen and red internal with tear all along the Right side from vagina to urethra'.

[5] The complainant identified the appellant by the scar below the eye and the cheekbones on his face. During cross examination she was confronted with the appellant's other scar that was indisputably visible than the scar on the left, lower right eye. Impressively to the trial court she stated that the appellant was wearing a cap that is why she could not have seen the scar¹.

[6] It is trite law that 'a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court, and will only interfere where the trial court materially misdirected itself in so far as its factually and credibility findings are concerned.'²

[7] The trial court was alive to the facts and was in a position to observe the complainant when she was testifying. The trial court even reprimanded the defence counsel during cross examination in trying to confuse the complainant or introduce that which the complainant never said.

¹ Page 144 of the record

² **R v Dhlumayo and Another 1948(2) SA 677 (A)**

[8] The appellant conceded that the bicycle depicted on the photo is his. The trial court described it as unique. The trial court took judicial notice of the area. The trial court went further to say that '[i]t cannot take [the appellant] 10 or 15 minutes at the most to engage [the incline], so he must have been home around 15:00... which would have given him ample time to commit these crimes.'

[9] In my evaluation of the evidence tendered, I find no misdirection on the part of the trial court's factual and credibility findings that led to its pronouncement of the guilty verdict. There is nothing at my disposal to warrant interference with the conviction.

[10] With regards to sentence, Holmes JA remarked as follows in *S v De Jager*³

'It would not appear to be sufficiently recognized that a Court of Appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of Appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable Court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock that is to say if there is a striking disparity between the sentence past and that which the Court of Appeal would have imposed. It should therefore be recognized that Appellate jurisdiction to interfere with punishment is not discretionary, but, on the contrary, is very limited'.

³ 1965(2)SA616A at page 629

[11] This Court therefore needs to determine as to whether the trial court exercised his discretion judicially when sentencing the appellant. 'It is also self-evident that sentence must always be individualized, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all the relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at the appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity.'⁴

[12] This Court has considered the trial court's judgment on sentence. Even though it may be argued that the trial court failed in considering and passing sentence in a dispassionate manner, it is clear that the trial court did consider the personal circumstances of the appellant, the crime and the interests of society vis-à-vis the provision of section 51(1) of the Criminal Law Amendment Act 105 of 1997(CLAA). It would appear that the trial court might have over-emphasized the crime and the interests of society, to the expense of the person of the appellant, which clearly resonates in the severity of the sentence.

⁴ S v SMM 2013 (2) SACR 292 SCA

[13] The appellant is a first offender, a young man of 22 years of age at the time of the commission of the offence with one infant child of 17 months. He was gainfully employed. In aggravation of the sentence, the state's counsel submitted that the appellant showed no remorse. She referred us in this regard to *S v Matyityi*⁵ where the Supreme Court of Appeal stated that '[t]here is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for him or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in Court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.'

[14] In *S v Malan*⁶ it was held that personal circumstances of an accused can be a "substantial and compelling circumstance warranting the imposition of a lesser sentence". In *S v Vilakazi*⁷ the court considered the principle set out in *S v Malgas* and following *S v Dodo*. The court held at paragraph [15] that 'it is clear from the terms in which the test as framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed minimum sentence, to assess, upon a consideration of all the circumstances of the particular case,

⁵ 2011 (1) SACR 40 SCA

⁶ 2004(1) SACR 246 (T),

⁷ 2009(1) SACR 553 (SCA)

whether the prescribed sentence is indeed proportionate to the particular offence...”

[15] Flemming DJP (as he then was) in *S v Martin*⁸ stated that “life sentence imposed upon a lively man of 30 years imposes a much longer and harsher sentence...” I have no doubt in my mind that an effective life imprisonment imposed on count 4 (rape) on the present lively 25 year old appellant is too severe and induces a sense of shock under the circumstances. I am of the opinion that his youthful age dictates that he is a candidate for rehabilitation and that renders the sentence disproportionate to the offence for which the appellant is convicted. In my view, the mitigating factors are at par with the aggravating. The interest of the communities and the duty bestowed on this court warrant a harsher sentence.

[16] The communities have been riddled with this crime of rape and robbery of cell phones with aggravating circumstances, at times leading to the causation of victims’ death. The Supreme Court of Appeal echoed in numerous cases that “courts are expected to dispense justice.” It is further echoed that “this kind of brutality” of robbing cell phones and rape is regrettably to regularly a part of life in South Africa. The public is eying the type of sentences this court is imposing critically. This court is expected to send out a clear message that behaviour such as this one will meet the full force and effect of the law.

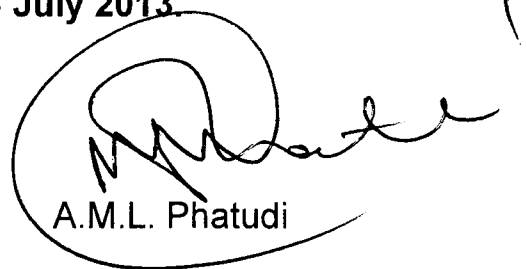
⁸ 1996(1) SACR (W)

I have no qualm with the sentence imposed for robbery (count3)

I, in the result, make the following order.

Order:

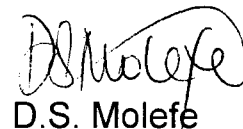
- 1. The appeal against the conviction is dismissed.**
- 2. The appeal against the sentence is partially upheld.**
- 3. The sentence imposed on count 3 is confirmed.**
- 4. The sentence imposed on count 4 is set aside and replaced with the following;
“Count 4: The appellant is sentenced to 20 (twenty) years imprisonment. The sentence on count 3 is to run concurrently with the sentence imposed on count 4, with an effective sentence of 20 (twenty) years imprisonment.**
- 5. The sentence is antedated to 26 July 2013.**



A.M.L. Phatudi

Judge of the High Court

I agree.



D.S. Molefe

Judge of the High Court

On behalf of the Appellant:

Legal Aid South Africa

2nd Floor

FNB Building

Church Square

Mr S. Moeng

On behalf of the Respondent:

The Director of Public

Prosecutions

Pretoria

Adv. M.J. Makgwatha