

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal number: A49/2015

In the appeal between:

NDOYISILE ISAAC SALIWE

Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE, J et FISCHER, AJ

JUDGMENT: FISCHER, AJ

HEARD ON: 27 JULY 2015

DELIVERED ON: 13 AUGUST 2015

- [1] The appellant Ndoysile Isaac Saliwe and two others were charged with the contravention of the provisions of section 3 read with section 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, as well as the provisions of sections 92(2), 94 and 256 and 261 of the Criminal Procedure Act, 51 of 1977 read with the provisions of sections 51(1)(a) and Schedule II of the Criminal Law Amendment Act, 105 of 1997 as amended. The allegations levelled against them were that on 26 January 2013 and in Phahameng in the district of Bultfontein and within the regional division of the Free State Province, the appellant and his two co-

accused unlawfully and intentionally raped the complainant Dinah Olifant, a 43 year old woman.

- [2] On 16 October 2014 the appellant was convicted as charged in the regional court. On 17 October 2014 and in the regional court for the Free State held at Odendaalsrus he was sentenced to life imprisonment in terms of the provisions of section 51(1) of Act 105 of 1997, as amended. The grounds advanced by the appellant in terms of his automatic right of appeal against the sentence were that the sentence was shockingly inappropriate for the reasons that: (1) factors in mitigation of sentence were not properly adjudicated, (2) the court showed no mercy, (3) the court failed to consider the fact that the appellant was forced by his co-accused to rape the complainant and (4) the court failed to take into account the fact that the appellant had already spent 22 months in prison prior to conviction and sentence.
- [3] To summarise, the appellant submitted on appeal that, having regard to the particular circumstances of the case the court *a quo* erred by making a finding that there were not compelling and substantial circumstances justifying a departure from the minimum sentence of life imprisonment.
- [4] It is necessary for purposes of considering the appeal to re-visit not only the approach of the court in respect of the sentence imposed but as importantly, the relevant facts which may be summarised as follows:

- 4.1 At approximately 0h30 and pursuant to a domestic problem involving her husband, the complainant left home and proceeded to the local police station. At the door of the police station she was approached by one of appellant's co-accused with a knife and pulled/dragged to where the appellant and the second co-accused were sitting "met hulle koppe gebuk".
- 4.2 The appellant's two co-accused then proceeded in turn to have sexual intercourse with the complainant in various positions whereafter the complainant raped her in a similar manner. The three perpetrators thereafter simply walked away. The complainant herself proceeded to a tavern where she asked the person in charge to accompany her to the police state where the incident was reported.
- 4.3 According to the appellant he was in the company of his two co-accused drinking alcohol at a local tavern sometime after 23h00. They then decided to go to a second tavern and on their way there one of appellant's co-accused saw the complainant some distance away, told his companions to stay put and ran in her direction stating that he was going to get money from her.
- 4.4 The appellant and the second co-accused overheard the first co-accused asking the complainant for money near some trees in the immediate vicinity of the police station whereupon this first co-accused returned to the complainant and the second co-accused.

4.5 The first co-accused then once again returned to the complainant and when the appellant and the second co-accused approached noticed that he had undressed the complainant and was in the process of having sexual intercourse with her.

4.6 When he had finished having intercourse with the complainant, the appellant suggested they immediately leave the scene whereupon the first co-accused who had just raped the complainant warned the appellant and the second co-accused that if they were not going to rape the complainant as well

“he was going to phone his friends from Welkom to come and stab us”.

4.7 The second co-accused then proceeded to rape the complainant whereafter the appellant testified that

“I was heavily under the influence of liquor and frightened and then I found myself doing that kind of thing, raping her.”

4.8 The appellant asked the complainant for forgiveness for raping her stating that

“I did not have the intention to do something like that and I also did not plan to do something like that”

and that he believed that he had been pressurised by his co-accused and adversely effected by consumption of alcohol.

- [5] Save to record that the first co-accused absconded whereafter a warrant of arrest was issued, and that the second co-accused was acquitted for lack of evidence, it is unnecessary to deal any further with the involvement of the appellant's co-accused. In sentencing the appellant to life imprisonment, the court *a quo* considered, in mitigation of sentence, the fact that the appellant had been in prison for approximately 22 months awaiting trial, that he had been under the influence of alcohol as well as his friends and that he was a first offender. In aggravation of sentence the court *a quo* found that the complainant was a defenceless woman who had been raped by three men and that it must have been a traumatic experience which would remain with her for the rest of her life.
- [6] It has repeatedly been stated that the appropriate sentence imposed on an accused such as the appellant must be balanced between the interests of society, the offence and personal circumstances of the accused, *in casu* the appellant (See **S v Banda and Others** 1991 (2) SA (BGD) at 355A).
- [7] On appeal a court can interfere with the sentence imposed by a lower court if it is clear that in all the circumstances such lower court did not exercise its discretion properly and judicially and that where a misdirection had taken place that the lower court did not exercise its discretion at all, alternatively exercised it improperly and/or unreasonably (See **S v Rabie** 1975 (4) SA 855 (A) and **S v Pieters** 1987 (3) SA 717 (A)).

- [8] The evidence led in mitigation of sentence relating to the personal circumstances of the appellant were the following: (1) he was 24 years old, (2) he was unmarried and had no children, (3) he had completed grade 10 at school, (4) he was gainfully employed at the time of the incident and his subsequent arrest, (5) whilst his mother was still alive he had no idea as to the whereabouts of his father, (6) he had asked the complainant for forgiveness for what he had done, (7) he asked the court to have mercy.
- [9] The court *a quo*, after considering the personal circumstances of the appellant as well as those factors which it regarded as aggravating, found no substantial and compelling circumstances present and imposed the prescribed minimum sentence of life imprisonment.
- [10] The Constitutional Court in **S v Dodo** 2001 (1) SACR 594 (CC) at para [40] confirmed that the “determinative test” approach employed in **S v Malgas** 2001 (1) SACR 469 (SCA) regarding when a prescribed sentence may be departed from is the correct approach to be followed as per **S v Malgas** *supra* at para [25]:

“If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

- [11] Nugent JA in **S v Vilakazi** 2009 (1) SACR 552 (SCA) at 560 confirmed with reference to both the **Malgas** and **Dodo** matters above that:

“It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.

- [12] The court *a quo* correctly found in accordance with the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 and more specifically section 51(3)(aA) that an apparent lack of physical injury to the complainant cannot and will not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.
- [13] I will accept that this court in assessing whether or not the prescribed minimum sentence was appropriate, is not entitled to resort to vague and unsubstantiated speculation and conjecture in an attempt to impose a lesser sentence which would comply with this court’s subjective notion of fairness (See **S v Kwanape** 2014 (1) SACR 405 (SCA) at para [15].
- [14] In *casu* and upon a careful reading of the record, it does however appear that the court *a quo* failed to have appropriate regard to the appellant’s personal circumstances and more specifically the fact that he was a relative youth, had asked the complainant for forgiveness and had spent the last 22 months in prison awaiting

trial. The court chose rather to rely on the view that the complainant had been severely traumatised and would carry the scars of the unfortunate incident with her for the rest of her life, notwithstanding the fact that there was no evidence on record to support this inference.

[15] A sentence of life imprisonment is currently the gravest of sentences that can be imposed on an individual by a court of law in South Africa and this for even more severe crimes such as murder. I am of the view that there are a number of factors that weigh heavily in the appellant's favour such as the fact that he is only 24 years of age, was gainfully employed, a first offender, had been materially influenced by his co-accused as well as the consumption of alcohol and that he had in conclusion seen the error of his ways in seeking forgiveness from the complainant. In my opinion these factors strongly suggest a very real prospect of rehabilitation. The trial court clearly ignored this reality and chose instead to focus on the nature of the crime as well as the complainant's personal circumstances. The Supreme Court of Appeal has found that such circumstances are deemed to be substantial and compelling and if discarded by the trial court would be deemed to be unjust entitling a court of appeal to interfere and impose a different sentence. (See **S v Nkomo** 2007 (2) SACR 198 (SCA) at para [13], [14] and [24]).

[16] In the circumstances I am of the opinion that the very real prospect of rehabilitation of the appellant together with the fact that he is a first offender who realised the error of his ways must, in the particular circumstances of the case, be regarded as

substantial and compelling circumstances justifying a lesser sentence than life imprisonment.

[17] In order to give substance to the prospect of rehabilitation, I am of the view that imprisonment for a period of 20 years would be more appropriate.

[18] The appeal against sentence accordingly succeeds and the following order is made:

The sentence of life imprisonment is set aside and there is substituted for it a sentence of imprisonment for 20 years.

Insofar it may be necessary to do, the sentence so imposed is antedated to 17 October 2014 being the date upon which the sentence of life imprisonment was imposed.

P. FISCHER, AJ

I concur.

B.C. MOCUMIE, J

On behalf of the appellant:

Mr J. D. Reyneke
Instructed by:

Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. M. Strauss
Instructed by:
Director: Public Prosecutions
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