

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: A104/2014

In the appeal of:

J[...] D[...] G[...]

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAL, AJP *et* MURRAY, AJ

HEARD ON:

13 OCTOBER 2014

JUDGMENT BY:

MURRAY, AJ

DELIVERED ON:

30 OCTOBER 2014

[1] This is an appeal against the sentences imposed on the Appellant by the Regional Court, Kroonstad, on 15 August 2013. The Appellant was convicted of two counts of rape, and sentenced to life imprisonment on both counts. The sentences were ordered to run concurrently.

[2] The convictions on 15 August 2013 followed on the Appellant's pleas of guilty on both counts in terms of section 112(2) of the Criminal Procedure Act, Act 51 of 1977. On Count 1 he was convicted of the rape of an 11 year old girl '*on more than one occasion*' between 29 August 2011 and 19 October 2011. On Count 2 he was convicted of the rape of a 15 year old girl on 29 October 2011.

[3] The Appellant did not testify before sentencing but in argument the following factors were submitted in mitigation and taken into account by the court:

- 1) that the Appellant was 27 years old;
- 2) that he is married with two children aged 6 and 4 years old;
- 3) that his wife was unemployed but that his parents maintained her and his children;
- 4) that the Appellant had had no formal schooling;
- 5) that he owned a hair salon from which he earned an income of R3 000 per month;
- 6) that he pleaded guilty and saved both girls the trauma of having to testify in court;
- 7) that he was a first offender; and
- 8) that he had been awaiting trial for approximately 21 months.

[4] As aggravating circumstances the Court *a quo* took into consideration:

- 1) that the Appellant had been in a relationship with the 11 year old girl's mother when the incidents of rape occurred;

- 2) that he was therefore in a position of trust regarding the child and should have guided and protected her, but instead waited until the mother was gone to rape her;
- 3) that the 15-year old was a *bona fide* customer who came to his shop to pay an account;
- 4) that instead of delivering the service he was supposed to, he grabbed her, pinned her down and raped her;
- 5) that the Appellant had no respect for the bodies of women or children;
- 6) that children were no longer safe in their own homes.

[5] In considering appropriate sentences the court *a quo* also took into consideration the epidemic proportion of and escalation in crimes against children, especially rape, in its area of jurisdiction. The court recognised the need to protect the women and children of that community so that they may be safe in their own homes and streets without simply being grabbed and raped. The court also recognised the need to impose sentences that would serve as a deterrent to the accused as well as to other potential perpetrators; that would restore the trust of the community in the judicial system; and that would prevent communities from taking the law into their own hands.

[6] The approach which a court of appeal should adopt in assessing the presence or absence of substantial and compelling circumstances was identified by Bosielo J in **S v PB**¹. At para [20] the judge held that a proper enquiry on

¹ 2013 (2) SACR 533 (SCA) at para [40].

appeal should focus on whether the facts which the sentencing court had considered, had been substantial and compelling or not.

[7] In the present case the court *a quo* singled out two of the mitigating factors which, had they been of sufficient weight, might conceivably have tipped the scale towards a finding that substantial and compelling circumstances did exist and could justify a lesser sentence than the minimum, namely the Appellant's guilty plea and his long incarceration.

[8] The court *a quo* rejected the notion that the plea of guilty in the present instance could have been a sign of remorse. It stated, first of all, that there was sufficient incriminating evidence to leave the Appellant no other choice than to plead guilty, and to render a plea of not guilty "*an exercise in futility*". In **S v Mashinini**², for instance, a submission that the Appellants' plea of guilty could indicate remorse was rejected by Mhlantla JA since, on the evidence before the court, the Applicant had no choice but to plead guilty.

[9] In the present case the court did not detail the incriminating evidence, except to refer to the fact that the Appellant was caught in the act by police while he was raping the 15 year old girl, which pertained to Count 2. It did not specify the incriminating evidence regarding Count 1. But, it is clear from the record that both complainants were present and ready to testify. The 11 year old girl was the daughter of the Appellant's girl-friend and would therefore know the

² 2012(1) SACR 604 (SCA) at para [24].

Appellant well and would undoubtedly have been able to identify him as the rapist and to incriminate him.

[10] I therefore find no reason to regard the court's failure to identify the incriminating evidence regarding Count 1 as a material misdirection since his finding of a lack of remorse did not rely only on this one ground alone. Similarly the finding that both crimes were committed on the same day, does not constitute a material error.

[11] The court *a quo* also took into consideration that the Appellant chose not to testify in mitigation, which, although he has the right not to do so, left only the attorney's averment that he was remorseful on record. In the Mashinini case, as in the present one, the Appellants did not verbalise any remorse. Since the presence or absence of remorse is a question of fact, the Appellant's failure to testify either during the trial or before sentencing, would make it very difficult for the court to determine whether the Appellant's guilty plea signified true remorse which would carry weight in mitigation or mere regret which would not.

[12] In S v Matyityi Ponnar JA referred to "*a chasm*" between regret, that is, feeling sorry for oneself because of having been caught, and remorse, which is genuine contrition for the plight of another. Ponnar JA stated that in order for remorse to be a valid consideration, the penitence must be sincere and the

accused must take the court fully into his confidence. Until that happens the genuineness of the contrition alleged to exist cannot be determined.³

[13] In **Director of Public Prosecutions, North Gauteng, Pretoria, v Thusi and Others**⁴ the following passage from *S v Matyityi* was quoted:

“After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed, what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”

[14] The Appellant in the present case pleaded guilty in a written statement submitted by his attorney. Nowhere in that statement did he express or even mention any remorse for his deeds. He did not testify, either during the trial or in mitigation before sentencing. In **S v Khumalo**⁵ it was found that fairness requires that for purposes of determining an appropriate sentence, evidence under oath would carry more weight than a legal representative's submissions from the bar.

[15] The court *a quo* finally took into consideration, too, that his observation of the Appellant in the dock, detected no sign of remorse and questioned the presence of remorse since the Applicant waited for two years after the rapes to plead guilty rather than to confess to his crimes sooner. In the light of all

³ *S v Matyityi*, op cit.

⁴ 2012 (1) SACR 423 (SCA) at [21]

⁵ 2013(1) SACR 96 (KZP) at [15].

the abovementioned factors, the court then found that the plea did not signify remorse.

[16] In **S v Furlong**⁶ it was found that, although the accused had pleaded guilty, it was on the available evidence not possible to discern whether his guilty plea could be taken to be a genuine expression of remorse, or whether it stemmed from *“a stark realisation on his part that the State had ‘an open and shut case’ against him, in which event his guilty plea would be a neutral factor.”*

[17] In the present case, the guilty plea could, at best for the Appellant be a neutral factor rather than a valid consideration. I therefore agree with the court *a quo* that the guilty plea in the present case is not a sign of true remorse and cannot be a factor which tips the scale towards the presence of substantial and compelling circumstances which would justify a digression from the prescribed minimum sentence.

[18] The other mitigating circumstance that the court *a quo* singled out for special consideration, was the length of time that the Appellant had been incarcerated and referred to a recent decision in the Supreme Court of Appeal that held that the mere fact that an accused had been incarcerated for a long time, is not in itself a substantial and compelling circumstance.

⁶ 2012 (2) SACR 620 (SCA) at [16]

[19] In **S v Malgas**⁷ the court indicated that the only matter that needed to be considered regarding the length of incarceration, was whether the delay in finishing their appeal “*in and of itself*” justified a lighter sentence. That court did not find such justification because the appellants themselves were largely responsible for the delay. In the present case, the court *a quo*, in my view correctly so, found that even though the delay was not solely caused by the Appellant, it can to a large extent be blamed on the postponements occasioned by his various changes of legal representatives.

[20] In and of itself the 21 months which the Appellant spent in incarceration therefore does not justify a lighter sentence and the court *a quo* found that there were no facts which in isolation or cumulatively with the other mitigating factors constituted substantive and compelling circumstances to justify a digression from the prescribed minimum sentence. The court *a quo* therefore dismissed this as a factor which could tip the scale towards the presence of substantial and compelling circumstances.

[21] In view, especially, of the Applicant’s repeated rape of the 11 year old girl, as her mother’s boyfriend whom she should have been able to trust to guide and protect her, and the similarly abhorrent attack on an innocent 15 year old customer who entered his hair salon with the *bona fide* intention to pay an account, I respectfully agree with Van Heerden JA who held in **S v D**⁸:

⁷ 2013 (2) SACR 343 (SCA)

⁸ 1995 (1) SACR 259 (A) at 259g

“... the appellant’s conduct was sufficiently reprehensible to fall within the category of offences calling for a sentence which would reflect the Court’s strong disapproval and act as a deterrent to others minded to satisfy their carnal desires with helpless children.”

[22] A Court in sentencing needs to take into consideration all relevant factors in such a way that the interests of the community, the seriousness of the offence and the personal circumstances of the Appellant are all properly balanced. (See: **S v Banda and Another**⁹). In my view, then, the court *a quo* did not overemphasise any of the abovementioned factors to the detriment of any of the others in imposing, in the absence of substantial and compelling circumstances, life sentences in both instances.

[23] Since a court of appeal will only interfere with a sentence if the sentence is shockingly inappropriate and/or if the Court *a quo* materially misdirected itself or committed some serious irregularity during sentencing, which in my view is not the case in the present matter, I find no reason for this court to interfere in the sentences imposed on the Appellant in the circumstances of this case.

WHEREFORE the following order is made:

1. The appeal against the sentences is dismissed.
2. The life sentences on both counts are confirmed.
3. The sentences are to run concurrently.

⁹ 1991 (2) SA (BGD 355 (A)).

H. MURRAY, AJ

I concur.

M.H. RAMPAL, AJP

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