

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A827/2011

(1)	REPORTABLE: YES ☒ NO ☒
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO ☒
(3)	REVISED.
2013.03.28	
DATE	SIGNATURE

28/3/2013

In the matter between:

MBUYISENI JOHANNES MAYISELA

Appellant

and

THE STATE

Respondent

J U D G M E N T

MAKGOKA, J:

[1] The appellant stood trial in the regional court, Ermelo, on one count of raping a mentally retarded woman. In the alternative he was charged with one count of sexual assault. He was legally represented during the trial. Despite his plea of not guilty, the

trial culminated in his conviction, upon which he was sentenced to a term of life imprisonment. The appellant appeals against the conviction and the sentence.

[2] The State led the evidence of two witnesses, Cindy Dladla, a nine-year old girl and her uncle, Mr. John Dladla. The State also handed in a medical report (the so-called J88 report), as was well as a pre-trial assessment report, in which it is concluded that the rape survivor, Ms. Delisile Habile, who is the nominal complainant, was mentally retarded. As a result, she was not able to give oral evidence. For the sake of convenience I shall refer to Ms. Habile as 'the complainant'. The appellant testified in his own defence and called no further witnesses.

[3] Cindy, who testified with the help of an intermediary, stated that the appellant came to her home on Saturday, 14 February 2009, looking for her mother, who was not there. The complainant, her aunt, was there. The appellant took the complainant by hand and they went into a tin shack. She peeped through a hole in the corrugated iron and saw the appellant undressing the complainant of her panties. The appellant also undressed himself of his trousers and underwear. He laid the complainant on the bed, climbed on top of her and 'bumped' on top of her. She ran to her uncle and made a report to him, who suggested that she should call her mother. Mr. John Dladla testified that on the day of the incident he was at home when the appellant came looking for his sister. He noticed that the appellant pulled the complainant towards the shack and they went inside. After approximately 10 minutes Cindy made a report to him that the appellant was doing 'something wrong'. He sent Cindy to call her mother.

[4] The appellant's version was that after he did not find Cindy's mother at her shack, and was about to leave, the complainant called him into the shack. Once inside the shack, she undressed herself and he did likewise. He wanted to have sexual intercourse with her. He touched her private part and at that moment he noticed that there was 'something wrong' with her. He left without having sexual intercourse with her. It was not in dispute during the trial that the appellant knew the complainant to be mentally retarded.

Jurisprudential framework

[5] Before I consider the merits of the appeal, it is prudent to set out the jurisprudential framework within which cases such as the present are to be considered. In considering cases of alleged sexual assault, the starting point is what was stated by the Supreme Court of Appeal (SCA) in *Stevens v S* [2005] 1 All SA 1 (SCA) para 1:

'Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safe-guards are properly applied and adhered to.'

[6] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) pars 21 and 22 the following was said:

'The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all evidence. For it is in the nature of such cases the available evidence is often scant and many prosecutions fail for that reason alone...'

[7] The issue in this appeal is whether or not there was penetration – a key consideration which has a bearing on the conviction. This aspect is dependent on the evidence of Cindy, who was a single witness. In terms of s 208 of the Criminal Procedure Act, 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent witness. The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect¹, or if there is corroboration². See further, *R v Mokoena* 1956 (3) SA 81 (A) at 85; *S v T* 1958 (2) SA 676 (A) at 678; *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G; and *S v Banana* 2000 (2) SACR 1 (ZSC).

[8] Furthermore, Cindy was a child witness. When dealing with the evidence of children, our courts have developed a cautionary rule which is to be applied to such evidence. The court must therefore have a proper regard to the danger of an uncritical acceptance of the evidence of a child witness. See the rationale for this approach in *R v Manda* 1951 (3) SA 158 (A) at 163E-F. The State's case also consisted of circumstantial evidence as there is no direct evidence of penetration. The cardinal rules when it comes to circumstantial evidence are trite, and were laid down in the well-known case of *R v Blom*³, namely:

- (i) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn;
- (ii) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not

¹ *R v Mokoena* 1932 OPD 79 at 80

² *S v Gentle* 2005 (1) SACR 420 (SCA).

³ 1939 AD (1) 188 at page 202-203

exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[9] Back to the facts of the present case. It was contended on behalf of the appellant that the State had failed to prove that the appellant penetrated the complainant. Furthermore, so it was argued, there was lack of medical corroboration of rape, viewed also in light of the fact that the complainant did not testify. The State supports the conviction.

[10] Before I consider the submissions in this regard, it is helpful to restate the approach to be adopted by a court of appeal when it deals with the factual findings of a trial court. The proper approach is found in the collective principles laid down in *R v Dhlumayo*⁴ by the then Appellate Division. They are the following: A court of appeal will not disturb the factual finding of a trial court unless the latter had committed a misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

[11] In the present case, the proved facts are following: the appellant took the complainant into a shack and closed the door; he desired to have sexual intercourse with the complainant; for that purpose he undressed himself, as well as the complainant; and touched her private parts. If one accepts the evidence of Cindy that

⁴ 1948 (2) SA 677 (A)

the appellant, after undressing himself and the complainant, laid the complainant on the bed, climbed on top of her and 'bumped' on her, the only irresistible inference to be drawn is that the appellant had penetrated the complainant.

[12] The court accepted Cindy's evidence and described her as a good witness. I agree. Cindy's evidence was coherent, consistent, and satisfactory in all material respects. I also agree with the learned regional magistrate that the absence of injuries does not necessarily exclude rape. It is clear that the complainant was a willing participant and therefore ready. This is different from a typical rape where the rapist 'forces' himself onto the victim. The complainant clearly 'consented' - only her 'consent' is vitiated by her mental condition. In the circumstances, the appeal against the conviction has to fail.

[13] As stated earlier, the appeal is also directed against the sentence, an aspect I now turn to. It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S v Petkar* 1988 (3) SA 571 (A), *S v Snyder* 1982 (2) SA 694 (A) and *S v Sadler* 2000 (1) SACR 331 (SCA) and *Director of Public Prosecutions, KZN v P* 2006 (1) SACR 243 (SCA) para 10.

[14] As to the nature of the misdirection which entitles a court of appeal to interfere, the following was stated in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F:

'Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that is shows, directly or inferential, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence'

[15] The circumstances of the rape brought the sentencing within the purview of s 51 of the Criminal Law Amendment Act 105 of 1997, which prescribes a sentence of life imprisonment, as the complainant was a mentally retarded woman. This is a prescribed, and not mandatory sentence, and the court may impose a lesser sentence if it finds that there are substantial and compelling circumstances. In the present case, the learned regional magistrate found no such circumstances, and accordingly imposed a sentence of life imprisonment.

[16] It was contended on behalf of the appellant that the sentence is gravely out of proportion with the facts of the case and the personal circumstances of the appellant; that the complainant suffered no injuries as a result of the rape, and that there was no evidence of lasting trauma suffered by the complainant; and that the appellant had spent nine months in custody awaiting the finalization of his trial.

[17] Where minimum sentences are applicable, the proper approach was established by the Supreme Court of Appeal in the path-finding and seminal judgment of *S v Malgas*⁵. The summary of the approach is conveniently set out in para 25, the effect of which is that the prescribed minimum sentence should ordinarily and in the absence of weighty justification be imposed. In para 1 of the summary the following is stated:

'If the sentencing court on consideration of 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.'

[18] The approach established in *Malgas* was endorsed by the Constitutional Court in *S v Dodo*⁶ as 'undoubtedly correct' and as having articulated 'a determinative test' (in para 1 of the summary referred to above), as to when the prescribed sentence may be departed from. The Constitutional Court explained the application of the determinative test as follows:

'To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in para 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits.

⁵ 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220).

⁶ 2001 (1) SACR 594 (CC)

Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.'

[19] in *S v Vilakazi* 2009 (1) SCAR 552 (SCA) Nugent JA stated the following in this regard at para 18:

'It is plain from the determinative test laid down by *Malgas*, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in *Dodo*, that a prescribed sentence cannot be assumed *a priori* to be proportionate in a particular case. It cannot even be assumed *a priori* that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of *Malgas* and of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice'.

[20] It is the court's duty to consider all relevant factors in considering whether substantial and compelling circumstances are present. It is important for a sentencing court to properly balance all factors relevant to sentencing against the benchmark set by the Legislature: *S v Mvamvu* 2005 (1) SACR 54 (SCA). Where minimum sentences are applicable, it was however remarked in *S v Malgas*, para 25 that in considering sentence on appeal, it is unnecessarily constricting to have regard only to the traditional approach to sentence on appeal.

[21] The Full Court stated the following in *S v GN* 2010(1) SACR 93 (T) para 12:

"Where the minimum prescribed sentence is life imprisonment, it is impossible to differentiate otherwise than by imposing a lesser sentence. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must also be taken into account. Accordingly, in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment.

[22] It was also remarked in *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) para 13, that life imprisonment is the heaviest sentence a person can legally be obliged to serve. Accordingly, where s 51(1) of the Act applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present. See also *S v Sikhapha* 2006 (2) SACR 439 (SCA) para 19, and *S v Matyityi* 2011 (1) SACR 40 (SCA) para 11.

[23] The personal circumstances of the appellant were placed on record as follows: he was 46 years old during the time of sentence. He is unmarried but has three major children from a previous relationship. During the time of his arrest he was employed at a butchery, earning R750 per month. He never attended school and is functionally illiterate. He was in custody for almost 9 months awaiting finalization of his trial. No

previous convictions were proved against him and he was therefore, regarded as a first offender for the purposes of sentencing.

[24] In my view, the circumstances of the commission of the offence, taken cumulatively with the appellant's personal circumstances, especially that he is a first offender at the age of 49; the period which he had spent in custody as an awaiting trial prisoner, constitute substantial and compelling circumstances. By failing to give sufficient weight to these factors and their cumulative effect, the learned regional magistrate misdirected himself. It is the type of misdirection which entitles this court to interfere with the sentence, and impose what this court considers appropriate in the circumstances. Even if this conclusion is wrong, I am of the view that with the application of the 'determinative test' set out in *Malgas*, the totality of the circumstances of the case render life imprisonment unjust. It would be disproportionate to the crime, the appellant and the needs of society, so that an injustice would be done were that sentence confirmed.

[25] That, notwithstanding, the crime of which the appellant was convicted is serious. The appellant clearly took advantage of the complainant's mental condition. Only a long term of imprisonment will emphasise the seriousness of the offence sufficiently, and at the same time serve the interests of the community and be fair to the appellant, in the sense that he has an opportunity to rehabilitate himself. I am of the view that 15 years' imprisonment would achieve that.

[26] Before I conclude, I am constrained to comment on some of the remarks made by the learned regional magistrate during his judgment on sentence. Emphasising the gravity of the offence, he said:

'I still say (that) a person who does what the accused has done, who rapes a young baby (sic) or a little girl or rapes this kind of a woman, deserves to be sentenced to the death penalty. This is how most people still feel. In the Biblical times people like you were stoned to death.'

(my translation from Afrikaans)

[27] These remarks are not only unfortunate, but are unbecoming of a judicial officer. The death penalty was declared by the Constitutional Court⁷ to be inconsistent with the values of the then interim Constitution.⁸ As a result, it ceased to be a sentencing option in our criminal jurisprudence. The result is that all judicial officers, on account of their oath of office, are enjoined to demonstrate their fidelity to the Constitution in giving effect to both the letter and spirit of that judgment. When judicial officers express a counterview in judicial pronouncements, they allow their personal, and possibly, religious, views to improperly enter the arena of judicial decision making. This undermines the very architecture and fundament of our constitutional order, underpinned by the rule of law, as it indirectly calls into question the wisdom of the judgment of the highest court in the land.

⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC)

⁸ Republic of South Africa Constitution Act, 200 of 1993

[28] In the result the following order is made:

1. The appeal against the conviction is dismissed;
2. The appeal against the sentence of life imprisonment imposed by the regional court is upheld. That sentence is set aside and substituted with the following:

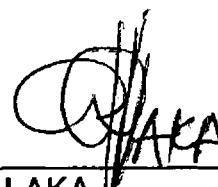
'The accused is sentenced to 15 years' imprisonment.'

3. In terms of s 282 of the Criminal Procedure Act, 51 of 1977, the substituted sentence is ante-dated to 29 July 2009, being the date on which the appellant was sentenced;
4. The Registrar of this Court is directed to bring a copy of this judgment to the attention of the Chairperson of the Magistrate's Commission, on account of paragraphs 26 and 27 of this judgment.



TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree



AP LAKA
ACTING JUDGE OF THE HIGH COURT

DATE HEARD

: 5 OCTOBER 2012

JUDGMENT DELIVERED : 28 MARCH 2013

FOR THE APPELLANT : ADV L AUGUSTYN

INSTRUCTED BY : PRETORIA JUSTICE CENTRE

FOR THE STATE : ADV PW COETZER

INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTIONS,
PRETORIA