

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case No: K/S57/03
Heard: 12/03/2012
Delivered: 26/03/2012

In the matter between:

ELLIOT JONAS

Appellant

v

THE STATE

Respondent

Coram: Kgomo JP; Williams J et Phatshoane J

JUDGMENT: FULLCOURT

KGOMO JP

1] The appellant, Mr Elliot Jonas, was a 20 year old man when the gang-rape was perpetrated on the complainant, Ms S, a 56 year old woman on 16 June 1998. He and another accused were correctly convicted in the De Aar, Northern Cape, Regional Court. A third accomplice is a fugitive from justice.

2] Because the provisions of s52(1)(b)(i) in particular schedule 2,

part I of the Criminal Law Amendment Act 105 of 1997 pertaining to compulsory or minimum sentences were applicable the Regional Magistrate referred the case to the High Court because the former court had no jurisdiction to impose a life imprisonment sentence, which was a competent sentence for a gang-rape or a rape committed by more than one accused on a victim. The appeal now serves before us with leave of the Supreme Court of Appeal, upon petition.

3] Lacock J found that there were no substantial and compelling circumstances and sentenced both accused to life imprisonment. In a nutshell the grounds upon which the appellant relies and persisted in before us are the following:

- 3.1 That the learned Judge disregarded the youthfulness of the appellant as a mitigating factor;
- 3.2 That the Court did not take into account the fact that the appellant had already been in custody for just under two years when sentence was imposed;
- 3.3 That the appellant was a first offender, a factor that the Court attached insufficient or no weight to;
- 3.4 That the appellant was in a drunken stupor ("tiepdronk" or dronkslaap) when the offence was committed;
- 3.5 That the cumulative effect of the foregoing factors do constitute substantial and compelling circumstances.

4] The approach of a court on appeal has been lucidly restated as follows in **S v Malgas** 2001(1) SACR 469 (SCA) at 478d-g by Marais JA, writing for a unanimous Court:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then

substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'."

- 5] On 16 June 1998, ironically a day of celebration dedicated to the youth of this country in bringing apartheid to its knees, the complainant, old enough to be the appellant's grandmother, was walking by herself between 15h00 and 16h00 in the afternoon from the house of a bereaved family to her home when the appellant and two criminal associates accosted her. She was dragged into a nearby bush, her head was bashed with a rock and they took turns in raping her. She knew all three fairly well and vice versa, by complainant's accepted account. One of the assailants told her that she has been looking down upon others for a longtime.
- 6] The complainant pleaded, screamed and threshed about but she was no match for her attackers two of whom held her down

whilst the other raped her. The trial Regional Magistrate described the complainant as slightly built (tingeriggebou). The complainant says she is a very sickly person and suffered from epileptic seizures, high blood pressure and arthritis.

7] The complainant testified further that her rapist threatened to kill her if she carried on screaming and resisting them. Mercifully, a teacher, Mr Booie Markman, who was cycling past stopped to chat to an acquaintance-passerby when he heard the complainant's plaintive cries. He caught the appellant's co-accused in the act of raping the complainant and intercepted him when he fled. The appellant and the fugitive from justice were a few paces away. They fled but appellant was later arrested. Markman knew all of them very well.

8] Lacock J, who was better placed than us and observed the complainant during her testimony, remarked as follows:

"Die traumatiese en vernederende effek wat hierdie verkrachtings op [me. S] gelaat het, is vandag, na ongeveer vyf jaar, steeds vlak op haargemoed en selfbeeld. Terwylsy in hierdie Hof die beseringswatsy opgedoen het in die verkrachtingsbeskryf het, het sy deurentyd sag gehuil, wousyniena die beskuldigde skyknie en soms die geestelike letsels wat dit op haar gelaat het treffend op in die woorde, "As ek tog maar liewer dood was."

Ek kan my nouliksenigietsergers voorstel wat die integriteit, selfbeeld, trots, selfrespek en vrouwees van 'n vrou kan verwoes soos wanneer sy verkracht word. Verkrachting is niks anders as psigiese of geestelike moord gepleeg op 'n vrou nie."

9] In my view the following can be construed to be

themisdirections by the sentencing court a quo:

9.1 The court did not take into account that the appellant had been an awaiting-trial prisoner for just under two years;

9.2 The court stated that:

"Wathierdiegevalsoveelmeerernstigmaak is dat die drie van u by herhaling die klaagsterverkrag het."

Counsel, and us too, understood this statement to mean that each one of the three accused raped the complainant more than once. The fact is that only accused 1 raped the complainant more than once. The appellant and the fugitive suspect beat a hurried retreat when accused 1 imposed himself again on the complainant. The appellant was therefore not a repeat rapist and did not facilitate the second rape nor did he associate himself therewith.

9.3 The provisions of sections 51 to 53 of Criminal Law Amendment Act, 105 of 1997 came into operation on 1 May 1998: thus only six weeks before the crime was committed on 16 June 1998. Our courts have always taken the salutary common sense approach that it is a mitigating factor when a newly created crime is committed or an accused falls foul of a recently enhanced sentence. The rationale being that the public may not have been apprised or sufficiently apprised of the adverse consequences of the offence or sentence. See: **S v Shangase** 1972(2) SA 410 (N) at 423G whereat **Harcourt J** state:

"As a limited and transient consideration, the question whether or not the offence had been committed so soon after the coming into force of the the Act that the particular accused was unlikely to have been aware of the new and more drastic approach to the whole question of

dagga.”

See also: **S v Kukarie** 1972(2) SA 907(O) at 916D-E.

9.4 The only other factor which can be regarded as mitigating (which the learned Judge indeed had regard to) is that the appellant was a first offender.

In light of the foregoing we are at large to assess sentence afresh.

10]The appellant was 20 years old at the time of the offence. There is nothing that suggests immaturity in his conduct. See: **S v Matyityi** 2011(1) SACR 40 (SCA) at 47e-48b (para 14) the Court held:

"[14] --- During the course of the judgment reference was made to the respondent's 'relative youthfulness', without any attempt at defining what exactly that meant in respect of this particular individual. It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others

reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor."

The appellant is accordingly treated as an adult.

11]The attack on the complainant was vicious and Mr Van Tonder, for the appellant, wisely did not pursue the aspect of appellant's age as mitigating nor did he seek to convince us that the appellant was drunk and that these factors impaired or blighted his mental faculties or influenced his conduct. The aggravating factors emanate clearly from what has been stated hereinbefore and need not be repeated.

12]Mr Van Tonder suggested that a 20-year sentence would be appropriate whereas MsSerepo, State counsel, submitted that the aggravating features by far outweigh the mitigating factors and that the life imprisonment sentence ought to be left undisturbed.

13]In my view, the factors enumerated in para 9 above, cumulatively considered, do constitute substantial and compelling circumstances which justify the deviation from the prescribed sentence of life imprisonment. In the circumstances I reckon that 20 years imprisonment would sufficiently express the moral turpitude of the offence, the interest and indignation of society whilst recognizing the ameliorating factors in the case in favour of the appellant.

ORDER

14] I make the following order:

1. The sentence of life imprisonment is set aside and the following sentence is imposed in its place:
 "The accused is sentenced to 20 (twenty) years imprisonment."
2. In terms of s282 of the Criminal Procedure Act, 51 of 1977, the sentence is antedated to 19 September 2003.

F DIALE KGOMO

JUDGE PRESIDENT

Northern Cape High Court, Kimberley

I concur

C C WILLIAMS

JUDGE

Northern Cape High Court, Kimberley

I concur

V M PHATSHOANE
JUDGE

Northern Cape High Court, Kimberley

On behalf of the Appellant:

Mr. A. Van Tonder

Instructed by:

Legal Aid Board

On behalf of the Respondent:

AdvSerepo

Instructed by:

Director Public Prosecutions