

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A272/2006

In the case between:

THE STATE

and

JOSEPH MOKOENA

JUDGEMENT: RAMPAI J

HEARD ON: 21 SEPTEMBER 2009

DELIVERED ON: 10 DESEMBER 2009

[1] This is an appeal by the state for leave to appeal against the sentence. I sentenced the respondent on the 10th November 2006. I imposed on him a sentence of 10 years imprisonment which I wholly and conditionally suspended. The respondent opposes the application.

[2] Mr Pienaar, counsel for the applicant, contended that I committed a material misdirection in sentencing the respondent as I did. He argued, therefore, that I improperly

exercised the sentencing discretion entrusted to me by entirely suspending the sentence. Accordingly he submitted that there were reasonable prospects of success on appeal.

[3] Mr Reyneke, counsel for the respondent, differed. He contended that I committed no misdirection at all in the light of the particular circumstances of the case particularly those of the respondent. His argument was that, on the facts, it could not be convincingly submitted that I improperly exercised the discretion I had. Therefore, he made the submission that there were no reasonable prospects of success on appeal.

[4] At the time of the crime the respondent was an adult male and mentally impaired. At the same time the victim was a minor girl who was also mentally impaired. In the absence of substantial and compelling circumstances, life imprisonment was supposed to have been an appropriate prescribed minimum sentence. The respondent was liable to such punishment on two distinct grounds because the victim

was doubly vulnerable. In the instant case, the two counsels were *ad idem* that there were substantial and compelling circumstances which justified a departure from the prescribed minimum sentence.

[5] At paragraph 12 of the sentence component of the judgment I enumerated and recorded the factors which moved me to make the critical finding that the interests of justice required deviation from the prescribed minimum sentence. I deem it unnecessary to recite them here.

[6] The *crux* of the matter was and still is the question: To what extent can a court deviate from the prescribed minimum sentence once it has found that substantial and compelling circumstances exist?

[7] The submission by Mr Pienaar seems to suggest that where there is a prescribed minimum sentence for a crime, as in the instant case, a wholly suspended sentence is *ipso facto* ruled out as a sentencing option. Such a proposition

appeared to be at odds with the sentencing discretion entrusted to a judge. I find it untenable. I am not certain whether the exercise of such a discretion is so rigidly demarcated that one may say that there is a bottom line beyond which the court cannot go.

[8] There is no specific provision in the applicable legislation, namely: The Criminal Law Amendment Act, 105 of 1997, which curtails the exercise of the sentencing discretion in the manner, suggested. I was not referred to any specific authority and I am not aware of any to support such a proposition. In exercising its sentencing discretion, there is no sentencing option too lenient for a court to consider. It seems to me that if the wholly suspended sentence was no longer an option in circumstances such as these the provision to such an effect would certainly have been inserted in the aforesaid legislation.

[9] The court has, of course, no unfettered discretion. It is bound to exercise its discretion judiciously taking into

account all the factors relevant to the difficult matter of sentencing. In doing so a court has to remain conscious and mindful that in certain serious and prevalent crimes such as rape of minor female children a prescribed minimum sentence has been ordained as a sentence which must ordinarily be imposed – **S v MALGAS** 2001 (1) SACR 469 (SCA) at para 18 on p. 480b-c.

- [10] The aforesaid passage means that even if the court finds justifiable reasons for zooming out of the compulsory sphere of sentencing into the discretionary sphere of sentencing, the benchmark has to be constantly kept in mind. However, it does not follow from this that there exists a defined barrier a court cannot cross, in its search for an appropriate punishment, where the prescribed minimum sentence cannot be imposed. In this case, **S v MALGAS** *supra*, at para 25 there are truly objective and compelling reasons not only for a different response but a substantially different response.

[11] It will therefore be readily appreciated that flexible ways do exist which circumscribe the bounds of the sentencing discretion. They are designed to minimise abuse of power, an evil inherently present in the exercise of a discretion and to promote proper and judicial exercise thereof.

[12] In sentencing the respondent I was alert and mindful of the sentencing principles. Sentencing him was no easy task. It was not a walk in the park. However, when this application was argued, I had a rare opportunity of seeing the respondent. I am indebted to Mr Reyneke for the initiative and the trouble he took by ensuring that the respondent attended these proceedings. Seeing the respondent convinced me even more about the appropriateness of the sentence I imposed on him. I could not ignore the fact that he had already spent approximately two years incarceration at the time I sentenced him.

[13] Ours would be a society that has lost its soul if an effective jail term, over and above such incarceration, were to be

imposed on an offender irrespective of his peculiar and personal circumstances identical to those of the respondent.

We are not a heartless society which condemns its weak, vulnerable and intellectually impaired members without any compassion and throws them into the deep donjons of prison because there is no precedent of a rapist who had previously ever been given a wholly suspended sentence.

[14] On the facts, I am not persuaded that I committed such a material misdirection in sentencing the respondent as I did. The disparity between the sentence I imposed and the sentence which a court with appellate jurisdiction would probably have imposed would not, on the facts, have been so huge as to warrant any interference. I am not persuaded that another court would, on those facts, have come to a different conclusion.

[15] In my judgment, it appears that there are no reasonable prospects of success in this matter should the appellant be allowed to go on appeal. I am persuaded by Mr Reyneke's

submission that it cannot be said in the circumstances of this case that the sentence I imposed on the respondent is shockingly lenient to warrant any interference on appeal. He also submitted that there are no reasonable prospects of success in this matter. There was substance in the submission.

[16] In the result the application for leave to appeal is refused.

M. H. RAMPAL, J

On behalf of applicants: Adv. T. Pienaar
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

On behalf of applicant: Adv. D. Reyneke
Instructed by:
The Justice Centre
BLOEMFONTEIN

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