



Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: A 179 / 23

In the matter between:

HENMURY CLOETE

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON THIS 1ST DAY OF MARCH 2024

De Wet, AJ:

Introduction:

[1] On a Saturday evening during April 2015, in a small town in the Western Cape, the appellant broke into the home of an elderly intellectually disabled gentleman, Mr S [...], who was well known to him, and proceeded to assault and rape him. After reporting the incident to a neighbour, the victim was taken to hospital due to his injuries. During November 2016, the appellant struck again, and the same

victim was once again attacked and raped by the appellant in his home. Following this *modus operandi* and during March 2018, also in a small town in the Western Cape, the appellant violently assaulted and raped another elderly gentleman, Mr B [...], in the street close to his home.

[2] On 6 November 2020 the appellant was found guilty on 7 charges, which included 2 counts of rape, in the Regional Court of Swellendam and on 11 March 2021 he was sentenced to life imprisonment pursuant to the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") on charges 4 and 5 ("the rape charges"). It was ordered that the sentences imposed in respect of the other charges run concurrently with the life sentences in terms of section 280(2) of the Act.

[3] The appellant appeals against the imposition of the prescribed minimum sentences of life imprisonment imposed in respect of charges 4 and 5 only.

Grounds of appeal:

[4] It was argued on behalf of the appellant that there were substantial and compelling circumstances justifying the imposition of a lesser sentence than that prescribed by the Act in respect of the rape charges, and that the court *a quo* had under-emphasised the interests of the appellant as it failed to properly consider a sentence which would allow the appellant an opportunity to be rehabilitated and reintegrated back into society one day. It was further suggested that a long period of direct imprisonment other than life imprisonment would address the seriousness of the offences and strike a balance between the appellant's personal circumstances

and the interests of the community. The appellant mainly relies on the fact that he was still relatively young at the time the rape offences were committed with only a previous conviction for the possession of drugs and no history of other violent crimes.

[5] The State opposed the appeal and argued that the appellant was an adult when he attacked and raped Mr S [...] and Mr B [...] and that the court *a quo* considered all the circumstances of this particular case before reaching the conclusion that imposing the minimum prescribed sentence was appropriate and proportionate to the offences.

Brief background:

[6] As the appeal lies against sentence only, it is not necessary to deal in any extensive detail with the evidence on the merits. However, a brief background of the factual circumstances is needed to appreciate and understand the ultimate sentence imposed by the court *a quo*.

[7] The appellant was 17 years old when he broke into the home of Mr S [...] and violently raped him. When he was 18 years old, he again broke into the home of Mr S [...] and again attacked and raped him. After Mr S [...] was attacked and raped on the second occasion, the appellant was arrested during November 2016. He resisted arrest, threatened the two police officers with a knife and told them that he intended killing them. The police only managed to arrest him after he was shot in the leg by one of the officers. The rape charges against the appellant at the time were provisionally withdrawn pending further investigation.

[8] During March 2018, when the appellant was 20 years old, he waylaid an elderly man, Mr B [...], whom he had been drinking with earlier in the evening, in the street outside his home, and proceeded to attack and rape him. The screams and cries of the Mr B [...] alerted a neighbour who together with another community member found him lying in the street crying and bleeding.

[9] Mr S [...] is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the SORMA") and is an elderly person. He testified in the court *a quo* with the assistance of an intermediary. According to a psychological report which was admitted as an exhibit in the court *a quo*, Mr S [...]’s intellectual ability is similar to that of a 5-year-old. He is also psychically disabled. Mr B [...], who had passed away prior to the trial in the court *a quo*, was between 62 and 64 years old and living on his own when attacked and raped. Mr B [...] presented as having difficulties in caring and expressing himself¹.

[10] Both victims suffered physical injuries including but not limited to anal tears and bruises.

[11] The appellant was charged with 7 counts ranging from housebreaking with intent to rape, rape, rape (contravention of section 3 of the SORMA), housebreaking with intent to rape, rape (contravention of section 3 of Act 32 of THE SORMA read with section 51(1), schedule 2, part 1 of the CLAA), rape (contravention of section 3 of the

¹The investigating officer testified that: "*Edelagbare ek kon agterkom dat Mnr B [...] was nie eintlik, hy was oud gewees en hy kon nie self, mentally was hy nie lekker om antwoorder self te gee, hy het altyd, hy het ondersteuning nodig gehad want hy was nog kranklik gewees, so sy het hom net geondersteun oom langsaan hom to sit*".

SORMA read with section 51(1), schedule 2, part 1 of the Act, assault with the intent to commit grievous bodily harm and resisting arrest.

[12] The appellant pleaded not guilty to all charges but was found guilty on all counts.

[13] Section 51(1) of the Act dictates that a person shall be sentenced to life imprisonment when convicted of rape as contemplated in section 3 of the SO Act if such person has been convicted of two or more offences of rape but has not yet been sentenced in respect of such convictions and if the victim is a person who is mentally disabled as contemplated in section 1 of the SORMA².

[14] In the court *a quo* the State requested the imposition of the minimum sentence in respect of charge 4 as Mr S [...] was a person that is classified as mentally or intellectually disabled and on charge 5 as the appellant had two convictions of rape in respect of Mr S [...] but had not yet been sentenced. These convictions related to charge 2 (the rape charge when the appellant was 17 years old) and charge 4.

General principles:

[15] It is trite that sentencing is generally a matter that falls within the discretion of a trial court. The appeal court's power to interfere with a sentence is limited to instances where the sentence is vitiated by an irregularity, by misdirection, where

² The section refers to a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was-

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) unable to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act;

the sentence is shockingly disproportionate, or where there is a striking disparity between the sentence and that which the appeal court would have imposed, had it sat as the trial court. In the matter of *S v Pillay* 1977 (4) SA 531 (A) at 535 E-F, it was explained as follows:

'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 it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably.'

[16] In the well-known and often quoted matter of *S v Malgas* 2001 (1) SACR 469

(SCA) 12 D-H, Marais JA explained an appeal court's jurisdiction as:

'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 ... 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.'

[17] It is trite that the minimum sentence legislation has introduced a sentencing regime in terms of which certain specified crimes attract minimum prescribed sentences, and such sentences cannot be departed from lightly or for flimsy reasons³. Only where it is shown that there are substantial and compelling circumstances which merit the imposition of a lesser sentence than the one prescribed, would the sentencing court be justified in imposing a lesser sentence⁴. The approach which an appeal court must adopt when considering a minimum sentence imposed in terms of the minimum sentence legislation, therefore, is whether the facts which were considered by the sentencing court are substantial and compelling⁵.

[18] The offence of rape was aptly described in *S v Chapman* 1997 (3) SA 341 (SCA) at 344I-J as “a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of a victim”. In the matter of *S v C* 1996(2) SACR 181 at 186 d remarked as follows in respect of the devastating effect that rape may have on victims as “A rapist does not murder his victim – he murders her self-respect and destroys her feeling of physical and mental integrity and security, His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life”

Analysis:

[19] The appellant’s legal representative placed the following personal circumstances of the appellant before the court *a quo*:

³ *S v Malgas* (supra) at para 25

⁴ Section 51(3) of Act 105 of 1997

⁵ *S v PB* 2013 (2) SACR 533 at para 20 and *S v GK* 2013(2) SACR 505 at para 51 C-E

- 19.1 He was 18 years old at the time he committed the offence pertaining to charge 4 and 20 years old when committing the offence pertaining to charge 5. He was 24 years old at the time of sentence. This is relatively young;
- 19.2 He is unmarried with no dependants, his mother passed away when he was 21 (after the offences were committed) and he has two siblings;
- 19.3 He left school in grade 6, at the age of 15, after being suspended;
- 19.4 He resided with his aunt in Barrydale and he worked as a farm labourer and earned R800 a week at the time of his arrest; and
- 19.5 He has a previous conviction for possession of drugs but no history of violent crimes.

[20] These personal circumstances had to be weighed by the court *a quo* against the following aggravating factors in the difficult task of sentencing, bearing in mind that the minimum sentence of life imprisonment had been ordained as the sentence which should ordinarily be imposed.

The appellant's relatively young age and the possibility of rehabilitation:

[21] Ponan JA stated the following in respect of the age of an accused as a mitigating factor in *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 11:

'...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.'

[21] In *S v Nkomo* 2007 (2) SACR 198 (SCA), the question of whether youthfulness makes an offender a candidate for rehabilitation was explored and the following was stated:

"But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors – that lessen an accused' moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course, these must be weighed together with aggravating factors, but none of these need be exceptional. The court below did not consider the mitigating factors adduced by the appellant to constituted substantial and compelling circumstances".

[22] In the matter of *S v Phulwane and Others* 2003(1) SACR 631 (TPD) at 634 H-J, the view was expressed that it is the responsibility of judicial officers to ensure that he or she obtains all relevant information pertaining to young or juvenile offenders in order to enable the court to structure a sentence that will best suit the needs and interests of the particular youth and that any sentence should promote rehabilitation and reintegration into the community at large. Whilst I agree that a court should explore and ensure that it considers whether a young or juvenile offender can possibly be rehabilitated with the imposition of a lesser sentence than life imprisonment, I am of the view that the responsibility of the presiding officer to obtain information where an accused is represented and no longer a minor is less onerous.

[23] It appears from the record that the court *a quo* was mindful of the fact that the appellant, although not a juvenile when he committed the acts convicted of in respect of charges 4 and 5, was only 18 and 20 years old respectively when he attacked and raped his victims. In terms of our law children are defined as minors under the age of 18. There is however no magic in the statutory threshold of 18 years⁶.

[24] In this matter, it appears that although the appellant was still young, he showed no remorse for his conduct in 2015 when he was still a minor and further bided his time to once again attack the same elderly disabled man, presumably because there were no consequences after the first attack a year and 6 months later. The appellant further, two years later, after the charges against him in respect of Mr S [...] was withdrawn, attacked Mr B [...] when he was already 20 years old, in a similar fashion. In my view the attacks on these vulnerable individuals were planned and executed in

⁶Centre for Child Law v Minister of Justice and Constitutional Development & Others 2009 (2) SACR 477 (CC) at para 39

a cold and callous manner. His conduct, when arrested, is equally concerning: he was aggressive, violent and threatening towards the police officials and showed no respect for law and order.

[28] To make matter worse, and as noted by the court *a quo*, the appellant knew Mr S [...], knew where he lived and must have known that due to his mental and physical limitations it would be difficult for him to relate his story to the police. The evidence was that he reported earlier incidents to the police but was laughed at. It was further the evidence of Mr S [...], which was considered by the court *a quo*, that he had shouted for help but the appellant was relentless and simply persisted with the assault. The appellant similarly followed Mr B [...] home, who was elderly and had been drinking with him and other community members and attacked him violently. The evidence was that Mr B [...] was bleeding and crying when found by the neighbour. The appellant was so confident about the inability of Mr B [...] to implicate him in the rape, that he told the neighbour that he had tried to rob the victim.

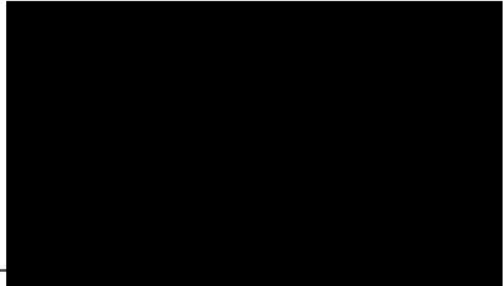
[29] How the appellant's conduct can be interpreted as him lacking maturity is uncertain. There was nothing to suggest that he was influenced, under the influence of any substances or acting in an immature or irresponsible manner. On the known facts, the appellant was calculated, fixed on what he wanted to do and proceeded without the slightest hesitation to attack his victims. His conduct remained consistent as he became older.

[30] In *S v Lehnberg* 1975 (4) SA 533 at para [5], the court held, "*It would only be in those cases where the evidence establishes an inherent evil disposition, which could be inferred from the nature of the crime, where the mitigating effect of his youthfulness would be disregarded*". The court *a quo* rightly so, did not disregard the youthfulness of the appellant. I agree with the court *a quo* that the attacks were brazen and indicates that the appellant's age, though considered as a mitigating factor, in the circumstances of this matter does not indicate that a lesser sentence would cause the appellant to rehabilitate, and on its own does not amount to substantial and compelling circumstances.

Conclusion:

[29] In my view the sentences are appropriate and there is no basis upon which this Court should interfere with the discretion of the trial court. In the circumstance the following order is made:

The appeal is dismissed.


DE WET, AJ

I agree and it is so ordered.


FORTUIN, J

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