

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A15/2015

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

HLAYISANI EPHRAIM VUKEYA

FIRST APPELLANT

MASENGANYI CHRISTOPHER VUKEYA

SECOND APPELLANT

VONANI WITNESS VUKEYA

THIRD APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] On 30th July 2014 the three appellants were convicted by the regional court magistrate MJ Coetzee of Malamulele regional court on one count of rape read with the provisions of section 51(1) of Act 105 of 1997 (CLAA) and one count of robbery. It was found by the court *a quo* that the complainant had been gang raped. On 4th August 2014 all the appellants were sentenced to life imprisonment on the count of rape and ten years imprisonment on the count of robbery. Both sentences were ordered to run concurrently.
- [2] Since the appellants were sentenced to life imprisonment by the regional court, they are having automatic right of appeal. The appellants' appealed against sentence only. On 18th September 2015 the High Court upheld the appeal on sentence, and set aside all the sentences imposed by the court *a quo*. The matter was referred back to the court *a quo* for compliance with subsections 274(1) and 274(2) of the Criminal Procedure Act 51 of 1977 (Act). As per the court order the State and defence were directed to lead evidence in aggravation and mitigation if any. Further that the fresh sentence to be imposed by the court *a quo* be backdated to the date of the original sentencing.
- [3] In compliance with the court order directing for compliance with section 274 of the Act, three probation officers were called to testify on behalf of the three appellants. In relation to the first appellant, the probation officer testified that he is married and having four children; self-employed; first born in a family of six; wife unemployed. The first appellant denies raping the complainant, and denied ever meeting her. The first appellant is involved in criminal activities for the fifth time. He is having three previous convictions of assault GBH and one of housebreaking. Three of the first appellant's children are receiving social grant. The first appellant is a member of the Zion Christiaan Church. The first appellant dropped out of school in grade seven, but did not give the reasons for dropping out. The first appellant is suffering from chronic illness. The first appellant smoke dagga but does not drinks alcohol. The first appellant has been described as a violent person who is always involved in violence, and

there are a lot of assault cases against him in the community. The first appellant is also violent towards his family members. The first appellant is not remorseful to the offences he has committed.

- [4] Regarding the second appellant, the probation officer testified that he is unemployed, and his mother has passed away and his father still alive; he is the third born in a family of six; the second appellant's father is unemployed. On the night in question, he was in the company of the first appellant when they found the third appellant raping the complainant in the bushes. After the third appellant had finished raping the complainant, he and the first appellant took turns in raping the complainant. After the second appellant had finished raping the complainant, he told the complainant that if she wants she can go and report the matter to the police, and may inform the police that they will find them at Mokumo, Mukasa or Mukhabela café. The complainant told the second appellant that the third appellant had taken her blackberry cell phone.
- [5] The second appellant is a first-time offender; he makes a living by doing odd jobs; he dropped out of school in grade 8 due to financial constraints; he is epileptic and prison authorities does not provide him with medication for his condition. The second appellant drinks alcohol and has bad behaviour when under the influence of alcohol. The second appellant is taking responsibility for the offences that he had committed, however he is showing lack of remorse.
- [6] Regarding the third appellant the probation officer testified that the third appellant is unemployed; he was raised well by both his parents who are both still alive; he dropped out of school in grade nine after repeating the grade twice; he is married and having one child; he was born during 1991; her wife is still a learner. The third appellant denies having committed the offences he been charged for.
- [7] With regard to the complainant the probation officers testified about the victim assessment report they have compiled. They testified that the complainant was dragged by the unknown man at about 20h00 when she was from work.

She was dragged to the bushes where she lost her consciousness on the way as a result of the struggle she was having with this man. When she regained her consciousness, she found that this man had already undressed her trouser and panty, and was on top of her raping her. Later two men came to the scene and took turns in raping her.

[8] The incident had severely affected her to the extent that she left her employment. Being raped by more than one person was traumatic to her. The complainant had never attended any therapeutic counselling sessions, and that leaves her on the risk of getting flashbacks of what had happened to her, and may lead to post traumatic disorder. The complainant had decided to quit her counselling sessions on her second appointment as she was irritated by long waiting on the queue before her file was handed to Malamulele hospital where she was supposed to receive therapeutic sessions. The complainant needs further assistance in understanding the impact that the incident will have in her life at a later stage if she does not go for counselling. The complainant was put through trauma that will last for the rest of her life. The complainant was put through unprotected sex when South Africa is facing high rate of people living with HIV and AIDS.

[9] The court *a quo* for second time still sentenced all the appellants to life imprisonment on the count of rape, and ten years imprisonment on the count of robbery. Both sentences were ordered to run concurrently. The appellants are having automatic right of appeal on the sentence of life imprisonment imposed by the regional court. The appellants have exercised their right by appealing on sentence only.

[10] The appellants grounds of appeal are that the imposed sentence of life imprisonment against them is shockingly inappropriate and it induces a sense of shock; the sentencing proceedings were vitiated with irregularities; the appellants were sentenced in terms of the provisions of section 51(1) Schedule 2, Part 1 of the CLAA, when the appellants were not warned of the applicability of section 51(1) of the CLAA, which resulted in the appellants not getting a fair trial; the court *a quo* erred by sentencing the appellants in terms

of section 51(1) of the CLAA when the appellants were not convicted of rape read with the provisions of section 51(1) of the CLAA; the court *a quo* erred by sentencing the appellants on the basis of the charge sheet that was defective in that the charge sheet referred to section 51(1) and/or 52 and Schedule 2 of the CLAA; the court *a quo* erred by sentencing the appellants in terms of section 51(1) of the CLAA when the charge sheet indicated section 51(1) and/or 52 of the CLAA is applicable in that: “gang rape”; the court *a quo* failed to attach any weight to mitigating factors placed on record on behalf of the appellants; the court *a quo* failed to take into consideration that the mitigating factors placed on record by the appellants individually constitute substantial and compelling circumstances which justify a deviation from the prescribed minimum sentence of life imprisonment; and that the court *a quo* did not fully understand the provisions of section 51(3) (a) of the CLAA relating to the issue of substantial and compelling circumstances.

- [11] The appellants’ appeal is directed on sentence only. It is trite that sentencing is the prerogative of the trial court and should not lightly be interfered with. An appeal in which the interference with sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court could have imposed it. The test is not whether the trial court was wrong, but whether it exercised its discretion properly. (See *S v Romer*¹).
- [12] The court *a quo* has found that the complainant has been gang raped by the three appellants, and therefore the sentence to imposed falls within the ambit wherein the prescribed minimum sentences are applicable. Ordinarily where minimum sentences are applicable, they should be imposed unless the court finds substantial and compelling circumstances to exist which justify a deviation from the prescribed minimum sentence. In the case at hand the minimum sentence which ordinarily should have been imposed is that of life imprisonment. The factors which are considered in determining whether

¹ 2011(2) SACR 153 (SCA) at paras 22 & 23

substantial and compelling circumstances exists are all factors traditionally taken into consideration in assessing an appropriate sentence.

- [13] In *The Director of Public Prosecutions Gauteng Division, Pretoria v Portia Thulisile Tsotetsi*² Coppel AJA said:

“As held in *Malgas* confirmed in *S v Dodo* and explained in *S v Vilakazi*, even though substantial and compelling factors need not be exceptional, they must be truly convincing reasons, or ‘weighty justification’, for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed”.

- [14] Some of the appellants’ grounds of appeal are that they did not receive a fair trial in that they were not warned of the applicability of section 51(1) of the CLAA at the commencement of the trial, but was only done so during sentencing stage; the appellants were not convicted of rape read with the provisions of section 51(1) of the CLAA; the charge sheet was defective; the charge sheet referred to gang rape, and that the words gang rape are not supported by section 51(1) and Schedule 2, Part 1 of the CLAA.

- [15] In *S v Legoa*³ Cameron JA said:

“It is an established principle of our law that a criminal trial has two stages – verdict and sentence. The first stage concerns the guilt or innocence of the accused on the offence charged. The second concerns the question of sentence. Findings of fact may be relevant to both stages. However, those in the first stage relate to the elements of the offence (or the specific form of the offence) with which the accused is charged. Those in the second mitigate or aggravate the sentence appropriate to the form of the offence of which the accused has been convicted”.

² [2017] ZASCA 83 (02 June 2017) at para 27

³ 2003 (1) SACR 13 (SCA) at para 15

[16] All the appellants have not appealed against conviction. Whether the complainant was raped by more than one person are the elements of the form of the offence of rape with which the appellants were charged in the court *a quo*. By not appealing against conviction, the appellants were satisfied that the State had proved the offence of rape against them, despite the alleged deficiencies. After the second sentencing, the appellants were aware of the alleged irregularities, and they also amended their notice of appeal. In amending their notice of appeal, they had an opportunity to also appeal against conviction, but they have failed to do so. By failing to appeal against conviction, the appellants were satisfied that the conviction was in order. It is therefore opportunistic of them to argue that they did not receive a fair trial whilst at the same time they are satisfied with the conviction.

[17] The appellants even though did not appeal against conviction, have raised grounds that are normally raised as part of an appeal against conviction. The manner in which these grounds are raised as part of the appeal against sentence are technical. It is trite that an accused has a right to be informed of the charge he/she is facing with sufficient details to enable him/her to answer. Further that the State if it intends to rely on the minimum sentencing regime created by a statute, that should be brought to the attention of the accused at the commencement of the trial. The State had conceded that from the charge sheet and the transcribed record it does not appear that the appellants were forewarned or conscientized of the possibility of the sentence of life imprisonment on the count of rape, but that the presiding regional magistrate did so during sentencing stage.

[18] In *S v Kolea*⁴ Mbha AJA said:

“In *S v Legoa* Cameron JA held that under common law it was desirable, but not essential, that the charge sheet should set out the facts the State intended to prove in order to bring the accused within a minimum sentencing jurisdiction. Referring to the Bill of Rights, he said that one of the specific

⁴ [2012] ZASCA 199; 2013 (1) SACR 409 (SCA) (30 November 2012) at para 8

rights referred to therein is to be informed of the charge with sufficient detail so as to enable an accused to answer to it. Although Cameron JA did not elaborate on what this exactly meant, he emphasised that, under the current constitutional dispensation it could be no less desirable than under the common law that the facts which the State intended to rely on for an increased sentence under the Act, should be clearly set out in the charge sheet. Significantly, his expressed view was that the matter was one of substance and not form. He was reluctant to lay down a general rule that the charge sheet must in every case recite the specific form of the scheduled offence, or the facts the State intended to prove to invoke a particular provision of the Act”.

[19] The charge sheet refers to section 51(1) or 52 of Schedule 2 of CLAA. It is common cause that section 52 has been repealed. The appellants were legally represented throughout the proceedings. The appellants have pleaded to the charge as it stands without raising any objection, and have also participated fully in the proceedings without at any stage of the proceedings raising any objection. During the second sentencing proceedings, the appellants never argued that their conviction was not in terms of section 51(1) of CLAA, but in terms of section 52 of the CLAA with the court *a quo*. They could not have argued that the conviction was in terms of section 52 because they knew that the section has been repealed. When delivering judgment, the court *a quo* has stated that all the three appellants were charged in terms of the provisions of section 3 of Act 32 of 2007 read with the minimum sentences Act. It can therefore not be said that the appellants were charged in terms of a repealed section. All these alleged irregularities were raised for the first time during the hearing this appeal, and was never raised during the first appeal. Despite raising these alleged irregularities, the appellants have failed show in what way they were prejudiced by all these alleged irregularities that they have raised.

[20] Despite the charge sheet referring to section 51(1) or 52, when the prosecution put the charge of rape to the appellants, the prosecution has stated that “*section 51 is applicable in this matter because the complainant*

was *gang raped*", and did refer to section 52. That shows that the prosecution was alive to the fact that the section has been repealed and was no longer on the statute book. By using the word 'gang' refers to more than one individual, and that cannot render the charge sheet to be defective. The evidence presented during trial had also proved that the complainant was raped by more one individual. That in my view, had clarified or cured any defect or vagueness that might have been in the charge. The appellants were legally represented throughout the trial, and their legal representative should have explained to them the seriousness of the offence they were facing and any possible sentence in case of conviction.

- [21] According to the evidence of the three probation officers, all the three appellants did not show any remorse, despite been convicted and the conviction was based on evidence which was overwhelming against them. Even their counsel before this court has correctly conceded that all the three appellants did not show any remorse. In *S v Matyityi*⁵ Ponnann JA said:

"Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence".

- [22] An accused can be said to be remorseful if he/she acknowledge the extent of his/her error, and the damage that he/she might have caused to the complainant. An accused who ask for leniency should at least show some form of remorse for the court to see that he/she is acknowledging his/her error. By the time the probation officers consulted with the appellants, the three appellants have already partly served their sentences, and have had

⁵ 2011 (1) SACR 40 (SCA) at para 47a-c

ample time to reflect on what kind of damage they have caused to the complainant. Despite the high unemployment rate in this country, the complainant was forced to resign from her work due the trauma that she was enduring, and still the appellants are unable to acknowledge the extent of the damage they have caused to the complainant. It will therefore be difficult for the court to be lenient to an accused who is not remorseful. The court must pass a sentence that will reform and rehabilitate an accused person. Remorse is the beginning of a journey to reformation and rehabilitation.

[23] Offences of this nature are prevalent in the entire country and has become a scourge. The complainant was attacked and dragged until she lost her consciousness and when she regained her consciousness, the third appellant was on top her raping her after he had undressed her. When the first and second appellant arrived at the scene, instead of coming to her rescue, they took turns in raping her. After they all have finished raping her, they all left the complainant in the bush despite it been at night exposing her to be further raped by others who had no respects for women. The complaint was raped in a brutal and degrading way by the appellants.

[24] In *S v Chapman*⁶ Mohamed CJ said:

“Rape is a very serious offence, constituting as it does a degrading and brutal invasion of the privacy, dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are the basic ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and entertainment, to go and come back from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives”.

⁶ 1997 (2) SACR 3 (SCA) at 5b-c

[25] The complainant was apprehended and raped whilst she was peacefully walking on the street from work. The appellants have shown that they did not have respect for these rights which women in this country are entitled to be protected. Despite the appellants having blatantly violated these rights, they did not show any slightest remorse. The second appellant when he told the complainant that she can go and report the matter to the police, sound as if he was boastful and not a sign of remorse. If it was a sign of remorse, he would not have left the complainant alone at the scene at night, and not take some initiatives to accompany her home.

[26] In my view, the personal circumstances of all the three appellants cumulatively taken are not truly convincing reasons or weighty justification for deviating from the prescribed minimum sentence of life imprisonment. On the other hand, the aggravating factors far outweigh the mitigating factors. There is nothing to fault the court *a quo* in finding that there were no substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence of life imprisonment on the count of rape, and ten years imprisonment on the count of robbery. From the comments of the presiding regional magistrate in passing sentence, it may look like he did not understand what constitute substantial and compelling circumstances. However, that did not change the fact that the appellants have failed to present convincing reasons or weighty justification for deviating from the prescribed minimum sentence of life imprisonment. It follows that the appellants appeal stands to fail.

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

27.1 The appellants' appeal is dismissed.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

I AGREE

PILLAY AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant : AL Thomo
Instructed by : Legal Aid SA Thohoyandou

Counsel for the respondent : Adv SM Mawasha
Instructed by : DPP Polokwane

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