IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no. CA109/2018
Date heard: 12/11/18
Date delivered: 15/11/18
Not reportable

In the matter between:

ANDILE NZIMA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

Plasket J:

[1] The appellant was convicted, by Renqe AJ sitting in the East London Circuit Local Division, of rape and robbery with aggravating circumstances. She sentenced the appellant to life imprisonment and 15 years' imprisonment for these crimes. He appeals against sentence with Renqe AJ's leave.

[2] On the evening of 19 April 2017, the complainant was walking home from a shopping complex where she had had a drink with a friend when she was accosted by the appellant. He grabbed her by the hair and demanded money and her cellphone. The complainant began to scream but no one came to her aid. The appellant grabbed her bag and struck her. He pulled her across the road and into a bushy area.

[3] He told her that he intended having sexual intercourse with her. She begged him not to rape her and offered him money as an inducement. In response, he called her a 'lying white bitch' and struck her a number of times.

[4] He pushed her to the ground, placed his knee on her throat and held a knife to her breast. He told her that he was going to send her to God. He pulled her jeans down and proceeded to rape her.

[5] When he had finished, he again demanded her cellphone. He could not find it in her bag. She told him to give her the bag so that she could find it for him. He did so. She pulled out a spray-can of deodorant, sprayed him with it, threw the bag at him and ran away.

[6] The appellant was identified by a security guard at the shopping complex. Surveillance cameras at the shopping complex showed him following the complainant when she left to walk home.

[7] The appellant was arrested the day after the incident. He led the police to the place where he had hidden the complainant's bag, which had contained a cellphone, a notebook, money, makeup, an identity document, spectacles and cigarettes. When the police recovered the bag, the cellphone was no longer in it. This was later recovered from the person to whom the appellant had sold it.

[8] At the trial, the appellant pleaded not guilty and raised the defence, which was rejected by Renqe AJ, that he had been so drunk that he had no recollection of what he had done.

[9] DNA evidence confirmed the identity of the appellant as the person who had raped the complainant. It followed that he was also the person who robbed her of her bag and other goods.

[10] A court of appeal does not have a free hand to interfere with the sentence imposed by a trial court. In *S v Bogaards*[1] Khampepe J stated:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[1] *S v Bogaards* 2013 (1) SACR 1 (CC) para 41.

[11] In this case, s 51 of the Criminal Law Amendment Act 105 of 1997, read with Part I and Part II of Schedule 2, prescribe sentences of life imprisonment and 15 years' imprisonment in respect of the rape of the complainant (because of the infliction by the appellant of grievous bodily harm) and the robbery with aggravating circumstances. That has an impact on how the sentencing process was to be approached.

[12] In *S v Malgas*[2] Marais JA held that when a court imposes sentence in respect of an offence referred to in the Act, it is no longer given a 'clean slate on which to inscribe whatever sentence it thought fit': it is, instead, required 'to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances'. The emphasis now is on 'the objective gravity of the type of crime and the public's need for effective sanctions against it'.

[13] It was argued by Mr Giqwa, who appeared for the appellant, that Renqe AJ had misdirected herself by overemphasising the seriousness of the offences at the expense of the appellant's personal circumstances. He also argued that this misdirection was highlighted by Renqe AJ's failure to order the sentences to run concurrently.

[14] The second point can be disposed of at once. Section 39(2)(*a*)(i) of the Correctional Services Act 111 of 1998 provides that 'any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence . . .'. Renqe AJ was correct not to order the two sentences to run concurrently and no purpose would have been served had she done so. No inference can properly be drawn from this that she thereby overemphasised the seriousness of the offence. She accordingly did not misdirect herself. There is consequently no merit in the argument advanced by Mr Giqwa.

[15] It was contended that the following facts cumulatively constituted substantial and compelling circumstances that would have justified a deviation from the prescribed sentences had Renqe AJ not struck an incorrect balance between the seriousness of the offences and the personal circumstances of the appellant: the appellant was single; he was 34 years old; he was not formally employed but did odd

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[2] *S v Malgas* 2001 (1) SACR 469 (SCA) para 8.

jobs now and again; he had no children; he came from a broken home; he was a first offender; and he had spent about 11 months in prison awaiting his trial.

[16] The fact that the appellant is single, unemployed, has no children and came from a broken home strike me as being irrelevant and unconnected to the measure of the appellant's moral blameworthiness. That leaves his age, that he was a first offender and that he had spent 11 months in prison awaiting trial as possible factors of relevance to sentence. All of these factors were considered by Renqe AJ in a thoughtful and well-reasoned judgment on sentence.

[17] Having set out all of the factors that I have listed, Renqe AJ proceeded to list a number of aggravating factors that concerned the seriousness of the offences committed by the appellant. They included that the appellant's victim was an elderly woman of 59 years; that she was 'brutally assaulted by the accused'; that as a result of what the appellant did to her, the complainant 'suffered psychological trauma' and 'has not been able to work after the incident because she is afraid of walking on the streets'.

[18] Before she turned to a consideration of the personal circumstances of the appellant, Renqe AJ set out the approach to sentence in a case such as this. She held:

'It is necessary to analyse the accused's personal circumstances that were advanced, contrast them with the aggravating circumstances and be cognisant of the fact that there is a prescribed minimum sentence ordained by the legislature which should not be departed from lightly and for flimsy reasons, which cannot [with]stand scrutiny.'

[19] She then considered the submission that the appellant's age was a mitigating factor. She held that at best for him it was a neutral factor, observing that the appellant had chosen not to testify in mitigation of sentence with the result that the court knew 'nothing about his level of immaturity or any other influence that may have been brought to bear on him to have caused him to act in a manner in which he did'.

[20] Renqe AJ cannot be faulted in her conclusions concerning the appellant's age. In *S v Matyityi*,[3] to which she referred in her judgment, Ponnan JA had

[3] *S v Matyityi* 2011 (1) SACR 40 (SCA).

considered a submission that the 'relative youthfulness' of a 27 year old appellant was a mitigation factor. He held:[4]

'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 the 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 reduces his blameworthiness. Thus, while 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] I turn now to the time spent in prison by the appellant awaiting trial. The correct approach to sentencing when an accused has spent a lengthy period in detention awaiting trial was dealt with by Lewis JA in *S v Radebe*[5] in which she held:

'A better approach, in my view, is that the period of detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.'

[22] Renqe AJ, after making reference to *Radebe*, concluded that the appellant had been 'brought to court within a reasonable period if one takes into consideration the nature and the seriousness of the charges that were preferred against the

[4] Para 14.
[5] *S v Radebe* 2013 (2) SACR 165 (SCA) para 14.

accused' and that the 11 months awaiting trial was not unjustified. She consequently found that the period of pre-trial detention was not of such a duration that it could be taken into account as a factor that was capable of affecting sentence`. In this conclusion, Renqe AJ cannot be faulted.

[23] With respect to the appellant being a first offender, Renqe AJ held – again with reference to the case law – that the Criminal Law Amendment Act does not provide for different sentences for rape first offenders and those with previous convictions and that, while the appellant's clean record must be taken into account, it is not in and of itself a substantial and compelling circumstance. She made the point that the Act prescribes 15 years' imprisonment as the sentence ordinarily to be imposed on a first offender convicted of robbery with aggravating circumstances.[6] The result is that logically a clean record cannot be a substantial and compelling circumstance when a 15 year prescribed sentence for robbery with aggravating circumstances is considered.

[24] When Renqe AJ balanced the personal circumstances of the appellant against the seriousness of the offence and the interests of society, she was not able to find that substantial and compelling circumstances existed to justify a departure from the prescribed sentences. She referred to the appellant's lack of remorse, his resort to 'a pack of lies' in order to try to escape the consequences of his deeds, and his subjection, thereby, of the complainant to the additional trauma of having to testify about her ordeal as being indicative of the slim prospects for his rehabilitation. She also referred to the inherent seriousness of the appellant's conduct – that he 'grabbed the complainant's bag, he assaulted her and that was still not enough, he raped her, calling her a "white bitch"; and that he had placed 'a knife on her breast and said: "Today you will meet God."'

[25] I have set out Renqe AJ's treatment of the issues raised by Mr Giqwa and her reasoning in some detail. From the judgment it is clear that she considered them and did so properly. I can detect no misdirection on her part. In my view, the balance she struck between the crimes, the criminal and the legitimate interests of society are entirely appropriate and proportionate. That being so, we may not interfere with her sentences and the appeal must fail.

[26] The appeal is dismissed.

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[6] Criminal Law Amendment Act, s 51(2)(*a*). In the event of a second conviction, the prescribed sentence is 20 years' imprisonment and 25 years' imprisonment in respect of any further conviction.

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C Plasket
Judge of the High Court

I agree.

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E Revelas
Judge of the High Court

I agree.

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V Nqumse
Acting Judge of the High Court

APPEARANCES

For the appellant:	Mr Giqwa King William's Town Justice Centre
For the State:	Mr Ndolomba Director of Public Prosecutions, Grahamstown