REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A206/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

MATHUSE, SAM Appellant

and

THE STATE Respondent

J U D G M E N T

MASHILE, J:

[1] The Appellant, a 33 year old man, appeared before the Regional Court of Gauteng held at Boksburg on 27 May 2010 subsequent to a charge of rape of B L, a 23 year old woman, on 7 November 2009. The rape was with aggravating circumstances as envisaged in Section 51 of the Criminal Law Amendment Act No. 105 of 1997 and occurred at Ramaphosa near Reiger Park in Boksburg.

[2] The Appellant was throughout the proceedings legally represented. He pleaded not guilty to the charge preferred against him and tendered no plea explanation. On 4 October 2010 the trial court nonetheless found him guilty and convicted him. On 13 December 2010 the Appellant was sentence to life imprisonment.

[3] The Appellant applied for leave to appeal against sentence on 6 July 2012 and the trial court granted such leave. For that reason the Appellant's appeal is only against sentence.

[4] I do not intend to set out the facts that led to the Appellant's conviction since he did not appeal against the trial court's pronouncement in that regard. Needless to state however that I shall during the judgment make reference to portions of the facts that led the trial court to conclude that the appropriate sentence in the circumstances was a life imprisonment

[5] A trial court has discretion when imposing a sentence. A court of appeal may interfere with the trial court's sentencing discretion if it believes that the trial court failed to exercise its discretion solicitously and correctly.

[6] If a court of appeal finds that the sentence of the trial court is disturbingly inappropriate or is violated by misdirections and indiscretion it will follow as a matter of course that the sentencing discretion was not properly applied. See in this regard, *S v Romer* [2011] JOL 27157 (SCA)

[7] In the premises this Court must decide whether or not the life imprisonment sentence imposed by the trial court provokes one's sense of shock or that it is blemished by misdirections and irregularities. If it did, this court will have the right to interfere by setting aside the sentence and imposing what it may consider apposite in the circumstances.

[8] In pursuit of establishing the above this Court needs to resolve whether or not the trial court considered the personal circumstances of the Appellant on the one hand and the interest of the society, the seriousness of the offence and its prevalence, on the other when exercising its sentencing discretion.

[9] To turn therefore first to the personal circumstances of the Appellant.

9.1 The Appellant was a self-employed male person with an income of approximately R300.00 per week;

9.2 He has two minor children who were aged 10 and 2 at the time when he was sentenced;

9.3 He was 33 years old at the time when the trial court sentenced him to life imprisonment;

9.4 He was a first offender in so far as this offence is concerned;

9.5 The appellant had already spent a period of 1 year in jail when the court *a quo* passed sentence;

9.6 His highest level of education is Grade 5.

[10] Section 51 of the Criminal Law Amendment Act No. 105 of 1997 prescribes a life sentence as the minimum sentence for rape with aggravating circumstances unless the court can find the existence of substantial and compelling circumstances justifying divergence from the prescribed sentence. It would therefore seem that the trial court could not find such circumstances hence the imposition of a life sentence imprisonment.

[11] The Appellant appears to be a person who is committed in life in that despite the high level of unemployment in the country he made means of taking care of himself and his family by becoming a street vendor selling various items. His focus needs to be redirected through reform and rehabilitation before it gets completely off the rails. Accordingly, I do not think

that the trial court accentuated this particular aspect satisfactorily when imposing the life sentence.

[12] The Appellant was only 33 years old when he was sentenced suggesting that he can certainly be given a chance to reform especially as a first offender. This is not to take away the unspeakable and vicious nature of the crime that he committed. Since it is settled in our law that sentencing needs to take into account rehabilitation, retribution and reform courts must strive to strike some kind of an equilibrium to guarantee that the sentences that they pass becomes a quintessence of the three.

[13] Perhaps the following passage of Holmes JA uplifted from *Sparks and Another* 1972 (3) SA 396 (A) at 410G may just be one of the most relevant to illustrate the point:

> "*It is the experience of the prison administrators that unduly prolonged imprisonment brings the complete mental and physical determination of the prisoner. Wrongdoers must not be visited with punishments to be of the point of broken*."
>
> See also *S v Skenjana* 1994 (2) SA 163 (W) 168 e-g.

[14] I am aware that Counsel for the Appellant makes heavy weather of the Appellant's 1 year stay in prison before he was sentence and contends vehemently that the trial court should have taken the period into account when imposing the sentence. That might well be so but it cannot come axiomatically and as a matter of course. Each case must be assessed on its own peculiar facts. See *S v Radebe 2013 JDR 0578 (sca), Para 14.*

[15] From the above I am of the opinion that the personal circumstances of the Appellant cumulatively especially if they are to be coupled with the show of mercy should have led the trial court to find that substantial and compelling circumstances existed entitling it to depart from the minimum sentence prescribed by the Criminal Law Amendment Act No. 105 of 1997.

[16] Quite apart from the existence of substantial and compelling circumstances though, as I have concluded herein, life imprisonment sentence is too disproportionate to the offence committed. Counsel for the Appellant referred me to *S v Vilakazi* 2009 (1) SCR 552 (SCA) wherein Nugent JA construed the determinative test in *S v Malgas* 2001 (2) SA 469 (SCA) to mean that the existence of substantial and compelling circumstances in the instance where the sentence imposed was too disproportional to the offence committed was not necessary to establish prior to the court's interference.

[17] The following passage from *S v GN* 2010 (1) SACR 93 (T) demonstrates the grim view that courts adopt against life imprisonment and the extent to which they will go in order to circumvent the imposition of such sentence:

> "*Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must also be taken into account. Accordingly, in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed minimum sentence is imprisonment for life. Put differently, where the prescribed minimum is life imprisonment, a court will more readily conclude that*

> *the circumstances peculiar to the case are substantial and compelling, to the extent that justice requires a lesser sentence than life imprisonment*."

[18] In *S v Mahomotsa* 2002 (2) SACR 435 (SCA) Mpati JA said the following:

> "*Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in S v Abrahams 2002 (1) SACR 116 (SCA) 'some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust' (para 29)*."

[19] I am obliged to contrast the degree of severity of the rape in this case with other comparable cases. The court in *S v Abrahams* 2002 (1) SACR 116 (SCA) and *S v Mahomotsa supra* did so.

[20] In the case under consideration the Appellant attacked the Complainant in her own home, a place that she regards as her ultimate sanctuary. He did not even bother that she is someone that she knows. The evidence is that the Appellant was once a boyfriend to the Complainant's other sister, Bongiwe.

[21] He stabbed her several times with a screwdriver in order to subdue her. When she managed to take away the weapon he hit her with a bottled. This case is therefore one of the most vicious. He was certainly not

remorseful and simply denied having raped the Complainant this is despite the fact that the Complainant's sixteen year old sister knows him and caught him in the act.

[22] If one were to compare this case to, for example, *S v GN* where a father raped his own 5 year old daughter and still received less than a life imprisonment sentence, it becomes inescapable to conclude that life imprisonment for this case is shockingly inappropriate.

[23] Similarly in *S v Nkomo* 2007 (2) SACR 198 (SCA) the Appellant had committed four rapes on the Complainant but despite describing such rapes as brutal, the court still felt that the Appellant did not deserve a life imprisonment sentence.

[24] The trend that has emerged is that the imposition of life imprisonment sentence is the ultimate and should only be imposed under the most extreme circumstances. Having said that it is worth bearing in mind the following extract the *Mahomotsa* case:

> "*There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, none the less all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty*."

[25] The Appellant has, as I have stated above, committed one of the most horrendous and violent rapes. That being the case, there are cases that were more evil and distressful yet they received less than life imprisonment.

[26] It is my opinion that the sentence that should be imposed on the Appellant should accommodate retribution, rehabilitation and give the Appellant a chance to reform. The society must be convinced that the justice system is not failing it lest it takes the law into its hands.

[27] Having considered all that I have mentioned hereinabove I make the following order:

1. The appeal succeeds. The order of the trial court is set aside and is replaced with:

> "The Appellant is sent to a direct imprisonment of 20 years."

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B MASHILE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

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SA THOBANE
ACTING JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

Date Heard: 17/10/2013

Date of Judgment: 4/11/2013

Counsel for the Appellant: Adv. C. Xamsana

Instructed by Legal Aid Board South Africa

Counsel for the Respondent: Adv. SJ Khumalo

National Prosecuting Authority