REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A419/2013
DATE: 17 APRIL 2014
NOT REPORTABLE
NOT OF INTEREST TO OTHE JUDGES

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

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DATE SIGNATUR

In the matter between:

SIPHO QWABE Appellant

and

THE STATE Respondent

J U D G M E N T

MASHILE, J:

[1] The Appellant stood before the regional court for the region of South Gauteng held at Germiston charged with two counts of rape of C[…] M[…] and D[…] N[…]. The two women were aged 24 and 22 respectively. They were raped on 3 April and 31 October 2009. He was legally represented throughout the duration of his trial and was warned that the provisions of Section 51 of the Criminal Law Amendment Act No. 105 of 1997 could become applicable for purposes of the imposition of sentence should he be found guilty as charged.

[2] Claiming that the sexual intercourse with both complainants was with their consent, the Appellant pleaded not guilty. On 6 March 2012, he was found guilty as charged and subsequently on the same day sentenced to 14 years direct imprisonment on each count. He was also declared unfit to possess a firearm in terms of Section 103 of the Firearm Controls Act No. 60 of 2000. The Appellant sought leave to appeal against sentence and the trial court granted it on 22 August 2012.

[3] The minimum sentence legislation has changed the general approach to the unfettered discretion that the trial court possessed when considering the imposition of sentence. The following passage uplifted from *S v PB* 2013 (2) SACR 533 (SCA) at 539 per Bosielo JA clearly marks the turning point:

> "*[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have*

imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."

[4] The trial court considered the interest of society, the nature and seriousness of the offence and correctly sought to strike a balance with the personal circumstances of the Appellant when determining the sentence to be imposed. The personal circumstances considered by the trial court prior to imposing the sentence on each count of rape were the following:

4.1 He was 37 years old at the time of sentencing;

4.2 He was married and had four children aged between 1-18 years old;

4.3 Prior to his arrest, he was employed as a security guard;

4.4 He was the sole breadwinner;

4.5 The appellant had no previous convictions.

[5] Emphasising the seriousness and the prevalence of the offence, the trial court went on to refer to the Criminal Law Amendment Act No. 105 of 1997 setting out the provisions of Section 51(2) especially the minimum sentences that would be applicable in the present case.

[6] In search of substantial and compelling circumstances before imposing the sentence, the trial court referred to *S v Brofy and another* 2007 (2) SACR 56 (W), which is an authority that the period spent whilst awaiting trial should be taken into account when sentencing. Although the trial court acknowledged this authority, it could not find that the time spent in jail while awaiting trial and the personal circumstances constituted substantial and compelling circumstances warranting a deviation from the minimum sentence prescribed by the Criminal Law Amendment Act No. 105 of 1997.

[7] The Appellant stayed for a period of 2 years and 4 months in jail while awaiting trial. The trial court felt that while this was so the seriousness of the offence, the violation of the complainants' dignity and security weighed heavily in favour of the imposition of the minimum sentence. In this regard I agree that this is a case where the personal circumstances of an appellant should recede and the seriousness, nature of the offence and the interest of the society should come to the fore. Accordingly, I do not find fault with the imposition of a minimum sentence of 10 years direct imprisonment on each count of rape.

[8] The trial court mentioned the show of mercy as one of the elements that should be considered when passing sentence but strangely continued to exhibit the contrary to the Appellant by exceeding the minimum sentence on each count by 4 years.

[9] The Criminal Law Amendment Act No. 105 of 1997 does grant a trial

court jurisdiction to exceed the minimum sentence by 5 years in instances where this is pertinent. It has been held that where a trial court intends to exceed the prescribed sentence it needs to extend an invitation to the counsel to make submissions. Furthermore, it cannot just pass a sentence that exceeds the minimum sentence without giving reasons. See in this regard *S v Maake* 2011 (1) SACR 263 (SCA).

[10] In the present case there is no evidence on the record that the trial court extended the invitation to the counsel to make submissions in case it passed sentence that was well in excess of the minimum sentence besides, he did not even supply reasons why he felt there was a need to exceed it.

[11] Against that background I make the following findings:

11.1 I agree that the trial court was correct in concluding that no substantial and compelling circumstances were present warranting a departure from the minimum sentence;

11.2 The exceeding of the minimum sentence by 4 years on each count is in violation of what was laid down in *S v Maake (supra)*.

[12] Accordingly, the appeal against sentence succeeds and I make the following order:

1. The sentence of the trial court is set aside and is substituted for:

1.1 The 14 years on Count 1 is reduced to 10 years direct imprisonment;

1.2 The 14 years on Count 2 is reduced to 10 years direct imprisonment.

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B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I Agree

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I OPPERMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,JOHANNESBURG

Heard: 27 March 2014
Judgment delivered: 17 April 2014
Appearances:
For Appellant: Adv EA Guarneri
Instructed by: Johannesburg Justice Centre

For Respondent: Adv LR Surendra
Instructed by: Office of the Director of Public Prosecutions