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

CASE NO: A33/2011
DPP REF. NO: JAP 2011/0040

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

[14 MAY 2018]

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SIGNATURE

In the matter between:

CEYLON, VIRGIL **APPELLANT 1**

STEYN, JAMES **APPELLANT 2**

and

THE STATE **RESPONDENT**

J U D G M E N T

MUDAU J

[1] The appellants were convicted in the Regional Court, Randfontein of rape in contravention of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as well as attempted murder.

The sentences imposed on each of the appellants in respect of the attempted murder charge were ordered to run concurrently with the sentence of life imprisonment in respect of the rape charge (which in any event would have followed *ex lege* by virtue of the provisions of s39 (2)(i) of the Correctional Services Act 111 of 1998). They were moreover declared unfit to possess arms in terms of s103 (1) of the Firearms Control Act 60 of 2000. The trial court also ordered that the names of the appellants be entered in the register for sexual offenders.

[2] The appeal is directed against sentence only and is with leave on petition by this court (Mahalelo AJ (as she then was), Mathunzi AJ concurring). The appeal turns mainly on whether the appellants were correctly sentenced to life imprisonment in terms of s51(1) of the Criminal Law Amendment Act 105 of 1997 read with Part 1 of Schedule 2 of the Criminal Procedure Act 51 of 1977 (the CPA), if consideration is had to their personal circumstances.

[3] A brief summary of the events from which the charges arose is the following. On 9 February 2009 at approximately 01h00 the complainant (then 28 years of age and a mother of two) asked for a lift from the appellants who were travelling in a bakkie. The first appellant was the driver of the vehicle and he was well-known to her as she resided in the same street as his grandfather. She was on her way from her aunt's house. They agreed and once in the vehicle she noticed that they were heading in the opposite direction to her intended destination. When she asked what was going on, the first appellant grabbed her right arm and the second appellant her left arm. They brought the vehicle to a standstill in an open veld where they alighted.

[4] The first appellant grabbed her and threw her to the ground. After removing her shorts and underwear, the first appellant raped her without the use of a condom while the second appellant was looking on. After he had ejaculated, she picked up her shorts put them on and tried to run. The second appellant ran after her and caught up with her. The second appellant removed her shorts and panties and raped her as well. However, he could not ejaculate, but invited the first appellant 'for another go'. Thereafter the first appellant raped her two more times. The second appellant also raped her once more but again was unable to ejaculate. The second appellant had thrown her shorts in the veld. She was on her back on the ground, inside and at the back of the bakkie when the ordeal occurred during which she was insulted and called names.

[5] The second appellant then took out an okapi knife and stabbed her several (approximately 7) times in her neck, face and upper-body. The first appellant urged him to finish her off. She struggled with him for the knife which she grabbed and threw away. In the process she sustained lacerations on her fingers. The second appellant kicked her and jumped on her head two to three times. Having dragged her into the bush, they left her for dead. The complainant regained consciousness and returned home. She again lost consciousness and was later fetched by an ambulance and taken to hospital for treatment where she remained for three days. The first appellant is also linked to the commission of the offences by DNA evidence. At the trial the second appellant denied that he had raped the complainant stating that he

had only stabbed her three to four times. The versions by both the appellants were rejected by the Regional Magistrate as false.

[6] Because of the multiple acts of penetration on the complainant by the appellants, the rape having been committed by more than one person in the execution or furtherance of a common purpose or conspiracy, the infliction of grievous bodily harm, s 51(1) of the Criminal Law Amendment Act, read with s 51(3) and Part 1 of Schedule 2 of the Act was applicable. The trial court however concluded that there were no substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence for the rape charge.

[7] There is no doubt whatsoever that the complainant was subjected to extreme and callous brutality for an extended period of time. It is trite that rape is a very serious offence. In *S v Chapman*[1] the Supreme Court of Appeal referred to it as 'humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim'[2] and went on to say that

> "[w]omen in this country...have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come 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."[3]

Rape has also been described as "an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific

[1] 1997 (3) SA 341 (SCA)
[2] Ibid at 344 I
[3] Ibid at 345 A-B

suffering and outrage on the victim and her family...A woman's body is sacrosanct and anyone who violates does so at his peril...."[4]

[8] It is trite that the court in considering an appropriate sentence must have regard and take into consideration the aims of punishment. These are deterrence, retribution, rehabilitation and prevention.[5] The court should also never lose sight of the element of mercy which has been described as a balanced and humane state of thought which should temper the approach to the factors to be considered in arriving at an appropriate sentence.[6] Mercy has nothing in common with maudlin sympathy for the accused. It recognises that fair punishment may sometimes have to be robust, eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger. However, the measure of the scope of mercy depends upon the circumstances of each case.[7]

[9] Both appellants testified in mitigation of sentence. They are both unmarried and without dependants. They had been in custody for approximately one year and six months whilst awaiting trial. It can readily be accepted that the first appellant was at least nineteen years and six months old and the second appellant at least twenty years six months old at the time of sentencing.

[10] Both appellants had passed grade 6. The first appellant admitted a previous conviction on 30 October 2008 for possession of drugs in contravention of s4

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[4] *S v Ncheche* 2005 (2) SACR 386 (W) 395G-H.
[5] *S v Rabie* 1975 (4) SA 855 (A) and see also *R v Swanepoel* AD 444 at 455; *S v Whitehead* 1970 (4) SA 424 (A) at 436 E-F
[6] *S v Rabie* at 861
[7] Ibid at 862 D-F

(b) of Act 140 of 1992 in respect of which the imposition of sentence was suspended for 4 years on customary conditions. He stated however that he had not used any drugs when the crimes were committed. He worked at a fuel service station where he earned R700-00 per fortnight. He pleaded for a lesser sentence other than a life sentence as he had elderly parents whom he assisted and said that he felt bad after his conviction. The second appellant was employed before his arrest and earned an unknown salary. The second appellant apologised only for stabbing and kicking the complainant but remained adamant in his denial of the rape. However as Fleming DJP stated[8]:

"For the purposes of sentence, there is a chasm between regret and remorse. The former has no necessary implication of anything more than simply being sorry that you have committed the deed, perhaps with no deeper roots than the current adverse consequences to yourself. Remorse connotes repentance, an inner sorrow inspired by another's plight or by a feeling of guilt e.g. because of breaking the commands of the Higher Authority. There is often no factual basis for a finding that there is true remorse if the accused does not step out to say what is going on in his inner self."

[11] In *Director of Public Prosecutions, Western Cape v Prins and Others*[9] the Supreme Court of Appeal held

> "No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women ... of their right to dignity and bodily integrity ...The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women ... have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South Africa has done in various provisions of our

[8] S v Martin 1996 (1) SACR 172 (W) at 177H-I
[9] 2012 (2) SACR 183 (SCA)

Constitution and in the Criminal Law ..."[10]

[12] The true horror of the crimes committed lies in the way the appellants went about invading her privacy and stripping the complainant of her dignity. First they pretended to help her by giving her a lift. Then they subdued her with violence when she resisted. The incident lasted several hours. She only arrived home shortly before 06h00. In the J88 report it is recorded that the complainant had fresh tears in her vagina over and above the multiple grievous lacerations caused by the stabbing. The appellants planned to kill the complainant after they had finished raping her, no doubt to avoid detection and eventual arrest, as the first appellant was well known to her. The incident was immensely traumatic for the complainant. The rape exposed her to the risk of sexual related diseases. I find it doubtful if any human being can go through what the complainant suffered without suffering mental trauma for the most part, if not the rest of her life.

[13] Counsel for the appellants understandably placed emphasis on the appellants' youthfulness as the main ground to constitute substantial and compelling circumstances in their favour warranting interference with the life sentences. In *S v Matyityi*[11] (para 14) the following was said regarding the youthfulness of an offender:

> "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 rule out immaturity. Although

[10] Ibid para 1
[11] 2011 (1) SACR 40 (SCA)

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 reduces 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."[12]

[14] In *Director of Public Prosecutions KZN v Ngcobo & Others*[13] the fact that the appellants were aged between 20 and 22 at the time of the premeditated murder was not regarded, on its own or with other factors, as constituting substantial and compelling circumstances. The court stated that none of them demonstrated immaturity and that there was no evidence of peer pressure. The finding of substantial and compelling circumstances by the trial court was, on appeal by the Director of Public Prosecutions for KZN, overturned and the lesser sentences imposed by the trial court were replaced with life sentences.

[15] As alluded to, the first appellant was 18 and the second appellant 19 years old when they committed the crimes. In terms of s 274(1) of the CPA, "A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed". In *S v Ravele*[14] Mocumie AJA, in criticising the trial court's failure to obtain a pre-sentencing report, said that no

[12] Ibid para 14
[13] [2009] 4 All SA 295 (SCA)
[14] [2014] ZASCA 118

court should proceed to sentence a youthful person (in that matter, a 20-year-old) unless it has all the facts relevant to sentencing. Distinguishable in this case, however, is that both appellants testified under oath and thus placed the relevant evidence before the trial court for purposes of sentencing. The second appellant admitted having stabbed the complainant several times but attempted to play it down in denying having raped the complainant. He was the gang member who had the task of killing the complainant after producing the knife when they had finished raping her with the first appellant, who was the younger of the two. The Regional magistrate was alive to the relative youthfulness of both the appellants.There is no indication that the appellants have taken any genuine responsibility for their actions. The first appellant even laughed while the complainant was testifying about the rape and had to be rebuked by the trial magistrate. That does not bode well for any prospects of rehabilitation.[15] The appellants did not take responsibility for their conduct.

[16] Unless and until they are rehabilitated, they pose a danger to every woman who finds herself in the position of the complainant. The complainant was fortunate that she lived another day to tell her story, and that the appellants did not succeed in their attempt to murder her. It was not for lack of trying. The case of *S v Malgas*[16] made it plain that the minimum sentencing regime in terms of the relevant statute signalled that it was not to be 'business as usual' when sentencing for the commission of the specified crimes. In his judgment in *Malgas*[17], Marais JA said that the purpose of the legislation was that of:

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[15] *S v Keyser* 2012 (2) SACR 437 (SCA) para 29
[16] 2001 (1) SACR 469 SCA
[17] Ibid

". . . ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it."[18]

[17] It is an established approach in our law that this court's power to interfere with the sentence is limited as the passing of punishment lies in the discretion of the sentencing court. A court of appeal may not simply substitute a sentence because it prefers it.[19] In this case, it is clear to me that the viciousness of their overall conduct rules out immaturity on the part of the appellants.[20] For these considerations, I am completely not persuaded that there are substantial and compelling circumstances, which would in this case justify a deviation from the prescribed sentence of life imprisonment, regard being had to each appellant's personal circumstances either individually or cumulatively.

[18] Given the totality of the circumstances of this case, the only appropriate sentence the court below could have imposed was one of imprisonment for life for each of the appellants in respect of the rape charge. The sentencing discretion was not improperly exercised as the sentences do not appear to be totally disproportionate to the crimes. Neither are they shockingly inappropriate. I cannot find that the trial court committed any material misdirection that warrants interference with the sentences imposed. It follows that the appeal must fail.

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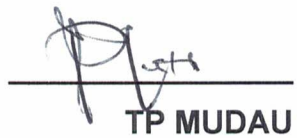
[18] Ibid para 8
[19] Ibid at 478F-G
[20] *S v Dlamini* 1991 (2) SACR 655 (A) at 666B-F.

Order

[19] The appeal is dismissed.



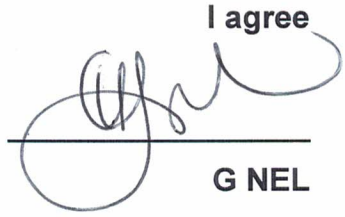
TP MUDAU

[Judge of the High Court,

Gauteng Local Division,

Johannesburg]

I agree



G NEL

[Acting Judge of the High Court,

Gauteng Local Division,

Johannesburg]

Date of Hearing:	30 April 2018
Date of Judgment:	14 May 2018

APPEARANCES

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