JM

IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

CASE NO: A422/2013
DATE: 26 MARCH 2014

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

_____ DATE

_____ SIGNATURE

In the matter between:

CHANKILE SAMUEL MAGANO APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

MSIMEKI J:

[1] On 8 February 2001, and in the Pretoria Regional Court, the Appellant was convicted of rape of a 12 year old girl. Section 51 (1) of the Criminal Law Amendment Act, Act 105 of 1997 (the CLAA) found application in this matter. The Regional Court stopped the proceedings in terms of Section 52 (1) (b) of the CLPA

and committed the accused for sentence as contemplated in Section 51 (1) and (2) by the High Court.

[2] The High Court referred the matter back to the Regional Court. It is not clear from the record why the matter was so referred. The Regional Court magistrate at page 64 lines 17-22 said:

"It is common cause that the matter having been referred to this court to make an enquiry, to make a finding whether there is (sic) substantial or compelling circumstances which can make this court impose a sentence on your person other than sending the matter to the High Court."

[3] The Regional Court again referred the matter back to the High Court for sentencing. Els J then considered the matter and found that the Regional Court had correctly convicted the Appellant and that the proceedings had been in accordance with justice.

[4] I am not going to deal with the issue whether what transpired when the matter was sent back to the Regional Court and from there back to the High Court was correct as this is not the issue that this court has been called upon to resolve.

[5] On 4 February 2002, Els J sentenced the Appellant to life imprisonment. On 22 August 2006 the Appellant applied for leave to appeal against the conviction and sentence. The court refused the application.

[6] The Appellant then petitioned the Supreme Court of Appeal for leave to appeal the refusal by the sentencing court of the application for leave to appeal. Such leave to appeal to the full court of this Division was granted. The Supreme Court of Appeal, when granting the leave to appeal said:

"The leave to appeal is limited to the following sentence: The full Court should consider the failure of the court to request a pre-sentence report."

[7] It is appropriate to refer to the brief facts of this matter before I deal with the issue which the court has been called upon to resolve. The Complaint's testimony reveals that on 18 May 1999, she (L. M.) and Peter A.M., her brother met the Appellant when they were on their way to school. They met him next to a cemetery. The Appellant beat them with a stick and accused them of not wanting to go to school.

The Appellant further told them that he would look for others who were also not keen to go to school. He took them to a house where he ordered the complainant's brother to undress and to have sexual intercourse with her. The brother refused. He was then hit with a stick and covered with a sheet or a blanket. The complainant was then ordered to undress where after the appellant then assaulted and raped her. She cried while she was being raped. The brother corroborated the sister's evidence when he testified. He told the court that the hole that the sheet or blanket had enabled him to see what the Appellant was doing to his sister. He later told the father about their ordeal.

On 18 May 1999, Ayanda Gomotsu Vilakazi, a district medical officer in Pretoria, examined the complainant after the rape. She compiled a report which discloses that the complainant was […..] years old at the time. She had not started menstruating. The officer noted tears of the hymen at five, six and seven o' clock. She also observed a tear on the complainant's perenium. The injuries, according to her, were consistent with forceful penetration. The Appellant testified and confirmed that he, indeed, had met the complainant and the brother on the day of the incident. This confirmed the state's evidence and solved the issue of identity. He, however, testified that he, after meeting the two, had accompanied them to their section and parted ways with them. He conceded that he was known to the complainant and her brother but denied raping the complainant.

[8] The issue the court has to concern itself with relates to the pre-sentence report.

S S Terblanche in his work*: Guide to sentencing in South Africa,* Second Edition, at page 104 paragraph 6.1 says:

"Any report drawn by an expert of some kind which is designed to assist the court in the quest to find an appropriate sentence can be described as a pre-sentence report. Although these reports are usually probation reports drawn by probation officers in the employ of the state. Many other reports also qualify. These include reports by private social-welfare experts, criminologists, psychiatrists and clinical psychologists".

See also S v Dlamini 1991 (2) SACR 655 (A) at 667 g-h.

[9] It is evident that pre-sentence reports are meant to provide guidance to the exercise of the discretion which a court has to exercise properly and judicially when sentencing a convicted offender. The reports assist a presiding officer to understand the offender and the reasons for the crime - this being one of the triad of factors that the court has to consider when deciding on an appropriate sentence. These reports are called for where a court feels the need to be better informed about the character and the possible future of the offender. An ideal pre-sentence report must embody all the necessary information relevant to the offender, the victim and the community. To be able to decide on an appropriate sentence the sentencing court needs to have sufficient information such as information relating to mitigating and aggravating factors.

[10] Pre-sentence reports are usually called for by the prosecution or the defence. The court, however, has a duty to step in and call for such reports where the need arises. *In Rammoko v Director of Public Prosecutions 2003 (1) SACR 200 (SCA) at 205g* the court said*:*

"[14] and the placing of important information before the sentencing court is not the responsibility of counsel alone. The presiding officer who must satisfy himself before imposing the prescribed sentence that no substantial and compelling circumstances are present also bears some responsibility"

In *S v Dlamini 2000 (2) SACR 266 (T) at 268 d-e* Van Der Walt J, said:

"Die hof wat vonnis oplê in 'n strafsaak neem 'n aktiewe rol in die verhoor en sit nie net passief by waar getuienis gelei word nie. Inderdaad bepaal art 186 van die Strafproseswet 51 van 1977 dat die hof kan op enige standium van strafregtelike verrigtinge iemand as 'n getuie by daardie verrigtinge dagvaar of laat dagvaar en die hof moet 'n getuie aldus dagvaar of aldus laat dagvaar indien die getuienis van so 'n (small) getuie vir die hof blyk noodsaaklik te wees vir die regverdige beregtiging van die saak."

A pre-sentence report which tells the court more about the offender and the victim always has the added advantage of properly placing before court all the information which explains why the offender committed the offence as well as his or her view with regard to the offence itself. If properly done, such evidence would also explain whether or not the offender is remorseful. The report which covers the victim as

well, discloses the impact that the offence has had on her. The sentencing court is then able to impose informed and properly considered sentences which are well balanced.

[11] The sentencing court had a discretion to exercise to call for the report or not. The court did not call for the report but proceeded to pass the sentence.

[12] The court, according to the record, did not engage the legal representatives regarding the question whether substantial and compelling circumstances existed in this matter.

[13] On the issue of the victim the court said:
"Die buskuldigde het 'n kind van [….] jaar verkrag. Daar is nie getuienis van hoe ernstig of indien sy enigsins beseer is nie, maar 'n mens hoef nie getuienis te hê om jou voor te stel wat se trauma so 'n kind met so 'n ondervinding moet opdoen nie."
The court then proceeded to say:
"Ek is nie tevrede dat daar enige wesenlike of dwingende onstandighede is wat 'n ligter vonnis reverdig as die verpligte vonnis voorgeskryf deur die Wet nie"

The Appellant was then sentenced to life imprisonment. *See page 82 of Volume 2 of the court record lines 18-24.*

[14] The court, without calling on Mr Kanyane for the Appellant, to address it on whether or not substantial and compelling circumstances existed in the case, merely asked if he agreed that the complainant had been [….] years old at the time of the rape and then said:

"Yes Mr Kanyane? Mitigation for sentence. How old is the accused? How old is the accused?" page 78 lines 7-9.

Mr Kanyane then informed the court that the Appellant was [……] years old and that he was [……] years old when the offence was committed. Although unmarried, he had two children a boy and a girl, aged [….] and […] years respectively. He worked as a police informer and had passed standard [….]. He had been in custody for 2 years awaiting trial.

The State asked that the Appellant be sentenced to life imprisonment. Without much ado, as shown above, the court acceded thereto and, accordingly, sentenced the Appellant to life imprisonment. This sentence seems to have worried the Supreme Court of Appeal which then asked this court to deal with the High Court's failure to request a pre-sentence report.

[15] Mr Mojuto, on behalf of the Appellant, submitted that the sentencing court ought to have obtained a pre-sentence report before passing sentence; that Mr Kanyane had not been given proper latitude to adequately address the court on the Appellant's history, his childhood and interpersonal relationship, for instance; that the court had merely asked leading questions which restricted Mr Kanyane in his address on mitigating circumstances; and that the state and the defence had not been invited to address the court on whether or not substantial and compelling circumstances exist in this case. Mr Mojuto contended that sentencing the Appellant to life imprisonment with inadequate information pertaining to sentence amounted to a misdirection. Ms Roos, for the state, disagreed and submitted that there was no misdirection and that the sentence had been appropriate.

[16] Mr Mojuto submitted that if the court found that there was, indeed, a misdirection, the matter does not have to be remitted to the sentencing court as the Appellant has already served approximately 15 years in jail. According to Mr Mojuto, remitting the matter to the sentencing court would be prejudicial to the Appellant in that the sentencing court, in the absence of substantial and compelling circumstances, could again sentence the Appellant to life imprisonment. In the event that we found that there was, indeed, a misdirection, remitting the matter in the circumstances of the matter *in casu* would result in immense prejudice on the part of the Appellant. This aspect was not even considered by Ms Roos who contended that the sentencing court had not misdirected itself.

[17] Mr Mojuto implored this court to find that there, indeed, was a misdirection necessitating the setting aside of the sentence and replacing it with a sentence of 17 years imprisonment which would then have to be antedated to 4 February 2002 which is the date on which the Appellant was sentenced.

[18] The Supreme Court of Appeal, in my view, was concerned about the severity of the sentence which had been accompanied by inadequate information relevant to

sentencing. This, in my view, caused it to request this court to look into the aspect of the High court's failure to request a pre-sentence report.

[19] A proper consideration of the record clearly reveals that:

1. The passing of a sentence of life imprisonment required the presence of enough information to enable the sentencing court to produce an informed and a balanced sentence. This information, which would have touched on the Appellant and the victim, in my view, is non-existent. The court needed more information relating to the Appellant and the complainant. The court, indeed, remarked saying:

> *"Daar is nie getuienis van hoe ernstig of indien sy ernstig beseer is nie"*
>
> The court then went on and said:
>
> "*maar 'n mens hoef nie getuienis te hė om jou voor te stel wat se trauma so 'n kind met so 'n ondervinding moet opdoen nie"*

To proceed and sentence the Appellant to a term of life imprisonment with the information that the court had, in my view, amounted to a misdirection. The court is in that event at large to consider the sentence afresh.

[20] *In S v Rabie 1975 (4) SA 855 (A) at 857 D-E* Holmes JA said:

1. In every appeal against sentence whether imposed by a magistrate or a judge, the court hearing the appeal –

   (a) Should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court"; and

   (b) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

I have demonstrated that the sentence in the matter *in casu* is vitiated by misdirection resulting in it being disturbingly inappropriate. The sentence, therefore, deserves to be altered.

[21] In *S v Malgas (2001) 3 ALL SA 220 (A) at 232 paragraph [25] B* Marais JA said:

"Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances".

At 233 C (I) the court said:

"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they (substantial and compelling circumstances) render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

[22] In this matter the misdirection has resulted in an inappropriate sentence. The court, even where the prescribed sentence is not to be imposed, has to be mindful of the fact that crime such as the Appellant has been convicted of *"has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying regard to the benchmark which the legislature has provided." See page 233d (J) of S v Malgas (supra).*

[23] The Appellant was 32 when he was sentenced and 30 years old when the offence was committed. He is unmarried but is a father of two children, a boy and a girl aged 10 and 17 at the time of the imposition of the sentence. He was a police informer who was not gainfully employed. He passed standard 9 and was in custody for 2 years awaiting trial. He has a previous conviction unrelated to the present offence which the sentencing court, correctly in my view, does not seem to have considered for the purposes of sentence.

[24 Having established that the sentence imposed on the Appellant needs to be altered and having regard to the circumstances of this matter the appeal against sentence, in my view, should succeed.

[25] In the result I make the following order

ORDER

1. The appeal against sentence is upheld.

2. The sentence of the sentencing court, namely life imprisonment, is set aside and replaced with the following sentence.

   "The accused is sentenced to 20 years imprisonment".

3. The sentence is ante dated to 4 February 2002.

_____
M.W MSIMEKI
JUDGE OF THE HIGH COURT
NORTH GAUTENG, PRETORIA

I agree

_____
C.P RABIE
JUDGE OF HIGH COURT
NORTH GAUTENG, PRETORIA

I agree

_____
A.M.L PHATUDI
JUDGE OF THE HIGH COURT
NORTH GAUTENG, PRETORIA

COUNSEL FOR THE APPELLANT: Adv.J M MOJUTO

INSTRUCTED BY: PRETORIA JUSTICE CENTRE.

COUNSEL FOR THE RESPONDENT: Adv.A ROOS

INSTRUCTED BY:

DATE OF HEARING: 26 FEBRUARY 2014
DATE OF JUDGMENT: 26 MARCH 2014