

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A219/2014

Date of hearing: 11 August 2014

Date of judgment: 14 August 2014

Not reportable

Not of interest to other judges

In the matter between:

DECEMBER BOY NGWENYA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

KUBUSHI, J

[1] The appellant is before us leave to appeal having been granted on petition to this court on sentence only. The appellant, a 54 year old man pleaded guilty and was convicted of the rape of a seven year old girl. In his plea explanation in terms of s 112 (2) of the Criminal Procedure Act No 51 of 1977, the appellant states that he raped the complainant in the children's bedroom at S[...]s house. However, according to the complainant's version of events as contained in the pre-sentencing report, which was admitted into the record as exhibit "B", the appellant raped her whilst she was busy urinating behind a tree. It does not appear as if the prosecutor consulted with the complainant before accepting the appellant's plea or read the docket in order to ascertain the true facts. As it often happens, where an accused pleads guilty, the prosecution acts with haste

to accept such plea without checking the correctness of the facts first with the complainant. It is my view that in such circumstances the prosecution does not act in the best interest of the complainant and such conduct may at times be prejudicial to the complainant. The prosecutors should, therefore, guard against such conduct. Be that as it may, the prosecutor having accepted the version of the appellant, it is that version which should prevail for purposes of this appeal.

[2] It is settled law that the imposition of sentence is pre-eminently a matter for the discretion of the trial court. A court of appeal does not have an unfettered discretion to interfere with the sentence imposed by a trial court. Only where it is clear that the discretion of the trial court was not exercised judicially or reasonably or where it induces a sense of shock or is startlingly inappropriate will the appeal court interfere.

See *S v Rabie* [1](#)

[3] The appellant submits in his heads of argument that, in sentencing the appellant to an effective term of life imprisonment, the sentencing court did not follow the principles laid down in the *Malgas* [2](#) decision and that it erred in over-emphasising the seriousness of the offence which the appellant committed and the interest of society whilst the personal circumstances of the appellant were under-emphasised. He further submits that in imposing such a lengthy period of imprisonment the sentencing court erred in imposing a sentence that is shockingly harsh and it induces a sense of shock.

[4] In argument before us, the appellant's counsel concedes the gravity of the offence in that a seven year old girl was raped. He however submits that the circumstances of this case do not warrant a sentence of life imprisonment as ordained by the legislature. According to him the trial court should have considered the cumulative effect of the appellant's personal circumstances and found that substantial and compelling circumstances calling for a deviation from the prescribed minimum sentence exist. His argument is that the trial court ought to have taken into account the age of the appellant, the fact that he is a first offender and that he pleaded guilty and showed remorse and came to a conclusion that the appellant was a candidate for rehabilitation.

[5] The respondent's contention in his heads of argument is that the trial court did not overemphasise the interest of the community at the expense of the personal circumstances of the appellant. According to the respondent, the trial court thoroughly took into account the personal circumstances of the appellant and from the tenor of the judgment it is evident that before the trial court imposed sentence, it had assessed, upon a consideration of all the circumstances of this case, whether the sentence was indeed proportionate to the offence charged.

[6] In argument before us the respondent's counsel submits that because of the age of the appellant a measure of pity was bound to rear its head, but implored us to consider the life of the young girl, which will never be

the same again. He came short of conceding that, cumulatively speaking, the personal circumstances of the appellant should have been considered by the trial court as substantial and compelling circumstances warranting deviation from the imposition of the prescribed minimum sentence.

[7] The sentence imposed on the appellant is in terms of section 51 (1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 (the Act). This is so because the appellant was found guilty of rape where the rape survivor is a girl under the age of sixteen years. The appellant stated in his plea explanation that his legal representative explained to him that a sentence of life imprisonment may be imposed if he is found guilty. He was therefore aware that the provisions of section 51 (1) of the Act, may be applicable.

[8] The sentence prescribed, in terms of s 51 (1) read with Part 1 of Schedule 2 of the Act, where a person is convicted of rape and the victim is under the age of sixteen years, is imprisonment for life. Section 51 (3) (a) of the Act provides that if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed, it may impose such lesser sentence. It is common cause that in this instance the trial court found no substantial and compelling circumstance to exist, hence the sentence of life imprisonment.

[9] It is common cause, in this instance, that the complainant was a woman under the age of 16 years - she was seven years old. It is also common cause that she was raped - the appellant has admitted as much. What this court should determine is whether the trial court overemphasised the gravity of the offence and the interest of society at the expense of the personal circumstances of the appellant; and whether the sentence imposed is shockingly harsh and induces a sense of shock.

[10] It is not in dispute that, in its consideration of sentence, the trial court took into account the nature and gravity of the offence, the interest of society and the personal circumstances of the appellant. However, it is disconcerting that the appellant's legal representative did not address the court in mitigation of sentence but deferred to the presentencing report. It is the duty of an appellant's legal representative to place before the court, information, which, is relevant to its exercise of discretion in relation to sentence. The sentence of life imprisonment, or any sentence for that matter, should not be taken lightly. A legal representative is therefore duty bound to provide a court with information which will assist it to come to a fair and just sentence. Failure to do so is in my view a dereliction of one's duty.

[11] The personal circumstances of the appellant, considered by the trial court, were as stated in that report. According to the report: the appellant was 54 years old when he was sentenced; he was illiterate and did not receive any training at all; he was from a broken family; his parents passed away whilst he was still young and was taken in by his aunt; there were problems in his upbringing and the probation officer noted that even

funds were not managed well in his aunt's family; he is not enjoying good health - he is epileptic; and was in custody for seven months awaiting trial. The court also considered that he is a first offender; he pleaded guilty even though he was aware that he was facing a possibility of life imprisonment if convicted; and the court made a factual finding that by pleading guilty the appellant showed remorse.

[12] In aggravation of sentence the trial court took into account the prevalence of the offence and the fact that many men sleep with minor children with the hope of being cured of AIDS; the fact that the complainant is a minor and the appellant an adult who was in a position of trust; and the minimum sentence prescribed by the legislature. The trial court also took the injuries sustained by the complainant as appears from the J88 into consideration.

[13] Having considered all the factors in the triad of sentencing, the trial court came to the conclusion that there are no substantial and compelling circumstances which warranted deviation from the prescribed minimum sentence and thus imposed a sentence of life imprisonment. I am however of the opinion that the trial court erred materially in coming to such a conclusion. To my mind, cumulatively speaking, the personal circumstances of the appellant are substantial and compelling enough for the trial court to have deviated from the prescribed minimum sentence. He pleaded guilty and the trial court was satisfied that by so doing he showed remorse.

[14] The appellant was 54 years at the time he was sentenced and for the first time had a brush with the law. My view is that, having found the appellant remorseful and also taking his age into account, the trial court should have found him to be a candidate for rehabilitation and given him a sentence that is meant to rehabilitate him. I do not think that a sentence of life imprisonment for life serves the purpose of rehabilitation. To my mind a sentence of life imprisonment is not appropriate in circumstances where a person at the age of 54 years is a first offender and has showed remorse. An appropriate and just sentence in the circumstances of this case is imprisonment for twenty years.

[15] Consequently I would make the following order:

1. The conviction is confirmed
2. The appeal against sentence succeeds
3. The sentence imposed by the trial court is set aside and replaced by the following sentence:

"1. The appellant is sentenced to twenty (20) years imprisonment.

2. He is declared not fit to possess a firearm in terms of s 103 of Act 60 of 2000.

3. The appellant's name to be placed on the register of Sexual Offenders in terms of s 50 (2) (a) of Act 32 of 2007"

4. The sentence is ante-dated to 17 March 2009.

EM KUBUSHI, J

I concur, and it is so ordered

P A MEYER, J

APPEARANCES:

On behalf of the appellant: Adv. S. Moeng

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11975 (4) SA 855 (A)

22001 (1) SACR 469 (SCA)