IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A536/2016

In the matter between:

ELIAS FINA MOILWA First Appellant

ABEL LESHAO Second Appellant

TEBOGO VALENTINE MAKGETHA Third Appellant

HENDRIK GOLIATH Fourth Appellant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

19/06/17
DATE

SIGNATURE

THE STATE Respondent

JUDGMENT

Tuchten J:

1 The four appellants were respectively accused numbers one to four in a regional court. They were charged with gang raping the complainant, a woman then aged 23, in a pit toilet cubicle in Extension 5, Tshing, Northwest Province on 6 July 2013. The offence was alleged to have been aggravated by the violence the rapists inflicted,

with the intent to cause grievous bodily harm, on the complainant, Before they pleaded, the appellants were duly warned of the applicability of the provisions of the minimum sentence regime imposed by the Criminal Law Amendment Act, 105 of 1977.

2 The first second and third appellants pleaded not guilty. The fourth appellant pleaded guilty to a single act of rape. He was, he said in plea explanation, alone when he raped the complainant and did not injure her except by raping her. The prosecutor refused to accept the plea as it was not in accordance with the state case and the plea of accused no 4 was changed to not guilty.

3 The four appellants were all convicted of having participated in the gang rape. The versions of all the appellants were rejected by the regional magistrate. They were each sentenced to imprisonment for life. Pursuant to the provisions of s 10 of the Judicial Matters Amendment Act, 42 of 2013, they all appeal to this court. The fourth appellant appeals only against his life sentence. The other appellants appeal against both their convictions and their sentences.

4 The complainant went that evening to a tavern. She had to walk part of the way home. Near a stream called Kaalgat, she was waylaid by a gang of young men, stabbed on the forehead and back when she

bravely tried to resist and dragged into a pit toilet. The toilet bowl itself is ceramic, with a wooden seat and was enclosed in a cubicle with metal walls and roof and had a metal door. Images of the toilet were admitted to the record. It is clear from these images that the toilet is designed to accommodate only one adult at a time. The complainant said that she did not know any of the rapists and was unable to identify any of them except for the first appellant.

5 When the complainant was dragged into the toilet and thereafter, the complainant screamed. Her screams were heard by a resident nearby, Mrs Seleke, who was woken by the screams at about 12h45 and called the police.

6 The complainant testified that she was stripped naked and forced to stand with her head in the toilet bowl. She was then vaginally raped by the several gang members from behind. She could not say how many rapists there were or how many times she was raped. There is no doubt whatsoever that the complainant was subjected to an orgy of brutality in that toilet cubicle. Her bloodstains were later that morning found on the toilet seat, the walls and the floor.

7 At a stage during this horrifying ordeal, the rapists paused. One of them expressed the view that she must be killed. The suggestion was made that she should not be killed in the toilet but back at Kaalgat. But according to the complainant, one of the rapists whom the complainant later identified as the first appellant, said that he had not yet been satisfied and wanted to rape her some more. The gang then dispersed. The first appellant slung the naked body of the complainant on his back and carried her off in the direction of Kaalgat.

S8 The state led DNA evidence at the trial. It was proved that the DNA of the second, third and fourth appellants were found in a semen stain lifted from the red jacket of the first appellant which the complainant was wearing when she and the first appellant were found by the police in circumstances I shall later describe. It was further proved that the DNA of the third and fourth appellants was detected on intra-vaginal swabs taken from the complainant.

9 The police eventually arrived at Mrs Seleke's house. She gave them directions and they went off in their vehicle. They encountered the complainant together with the first appellant. The complainant testified that when the headlights of the police vehicle became visible, the first appellant put the complainant down and gave her a T shirt or jersey which he had been wearing with which to cover herself. In fact the first

appellant gave the complainant his red jacket which the complainant wore. The first appellant was detained and he and the complainant were taken by the police to the police station. The complainant was later examined by a medical practitioner during the early morning on 6 July 2013. The doctor concluded that she had suffered vaginal injuries consistent with being raped from behind. She was found by the doctor to be dishevelled and covered with human urine.

10 The version of events advanced by the fourth appellant was that he alone raped the complainant when she ran into the toilet to seek shelter after, so the fourth appellant testified the complainant told her, an argument with her "husband". This cannot be true because Mrs Seleke, an independent witness who impressed the regional magistrate, testified that she had seen three "boys" at the toilet. One of them was wearing a white jacket, one a red jacket and another a "greyish background coat". She saw the young man with the red jacket go into the toilet and the one with the white jacket come out. She heard the tallest of these men say that they must kill the complainant.

11 The version of the first appellant was that he was the boyfriend of the complainant. He said that while in the company of the second appellant, he found the complainant at the home of the third appellant. He drew the inference that she had been unfaithful to him and

became angry, he said, at this betrayal. He then stabbed her. The second appellant happened to be there, so proceeds the version, and restrained the first appellant from further injuring the complainant. The complainant then sneaked away and, he said, he later saw her hiding in the toilet. He asked her to accompany him to get her treatment for her injuries. The version of the first appellant is that he did not have intercourse with the complainant that night.

12 But no bloodstains were found at the home of the third appellant while copious bloodstains were found in the toilet. It is simply impossible that there would have been no bloodstains at the home of the third appellant if she had been stabbed there as alleged by the first appellant. Furthermore, the second appellant could not innocently have been in the company of the first appellant because the semen of the second appellant was detected on the red jacket. The version of the first appellant can therefore not be reasonably possibly true.

13 It was submitted by counsel for the first appellant that there was no evidence that the first appellant actually raped the complainant. I do not agree. There was the evidence of Mrs Seleke that the young men outside the pit toilet, including the man wearing the red jacket, took turns in going into the toilet. The evidence of the complainant was that each of those who went into the toilet raped her. Then there is the

evidence that the person who must have been the first appellant told his co-perpetrators that he had not had enough - not that he had not had any. The first appellant carried the complainant off to rape her further and then kill her. He would not have been part of the gang in the first place if he had not wanted to share in the criminal spoils of their enterprise. The first appellant fabricated a version in an attempt to take account of the DNA evidence against the second and third appellants. He is unlikely to have done this unless he had been one of the rapists.

14 The regional magistrate found all the state witnesses, including the complainant and Mrs Seleke, to be credible witnesses. An appeal court should be hesitant to interfere with the factual and credibility findings of the trial court. No misdirections have been shown to have been made by the trial court and the record supports the conclusion that the complainant and Mrs Seleke are both credible and reliable. The complainant is corroborated by the circumstances in which she was found together with the first appellant and the condition in which the medical practitioner found the complainant very shortly thereafter, as well as by the injuries found by the medical practitioner on examination of the complainant. The complainant is further corroborated by the elaborate and absurd versions proffered by the appellants in an attempt to weave exculpatory or less incriminating

versions around what they must have appreciated were the inescapable facts of the DNA evidence and the visible injuries caused to the complainant when she was stabbed.

15 The rejection of the version advanced by the first appellant necessarily leads to the rejection of the versions of the second and third appellants as well. In the case of the second appellant, there is further the fact that his DNA was found on the red jacket. The most likely explanation for the presence of the semen of the second, third and fourth appellants in the stain on the jacket of the first appellant is that it leaked there from the body of the complainant.

16 There is thus no reason to interfere with the conclusion of the regional magistrate that the appellants are all guilty as charged of gang raping the complainant. I would therefore dismiss the appeals against conviction. I turn to the appeals against sentence.

17 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. During the sentencing process the court should never lose sight of the element of mercy. The concept of mercy 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. It has nothing in common with maudlin sympathy for the accused, recognises that fair punishment may sometimes have to be robust, eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger. The measure of the scope of mercy depends upon the circumstances of each case.

18 The court further must strive to balance all the facts, factors and circumstances evenly for the attainment of the aims of punishment as set out above. In this regard, a court must have regard to the nature of the offences, the personal circumstances of the accused and the interests of society. A court should strive to impose a proportionate sentence without over-emphasising or under-emphasising any of these factors at the expense of the other.

19 In terms of section 51 of the Criminal Law Amendment Act, 105 of 1997 the court must impose the prescribed sentence of life imprisonment in a case such as this unless there are substantial and compelling circumstances to justify a deviation from the prescribed sentence. The approach a court should follow in determining whether there are substantial and compelling circumstances present was laid down in *S v Malgas* 2001 2 SA 1222 para 25:

B. 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.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (`substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislative has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they 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.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.

20 The concept of remorse is an important factor in the evaluation of an appropriate sentence. Remorse is something different from regret. The nature of remorse was explained in *S v Matyityi* 2011 1 SACR 40 SCA para 13:

> There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.

21 It follows, therefore, that an accused person who has refused to take responsibility for his actions can seldom if ever claim to have demonstrated remorse.

22 Finally in these general remarks and before I deal with the specific cases of the appellants, I refer to *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 2 SACR 183 SCA para 1:

> 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 Constitution and in the Criminal Law ... .

23 None of the appellants testified in mitigation of sentence. Their personal circumstances were placed before the court by their legal representatives. The first appellant was 21 when he was sentenced on 20 October 2015. He was therefore 19 (not 18 as his lawyer asserted) when he committed the crime. He was unemployed when he was arrested on the day of the crime. He lived with his parents. He completed Grade 9 at school. He had a previous conviction for robbery, committed on 20 December 2012, for which he received a suspended sentence, corrective supervision and community service.

24 The second appellant was 23 when he was sentenced and 21 when he committed the crime. He was unemployed when arrested on the day of the crime and lived with this mother and brothers. He had a minor child. He completed Grade 12 at school. He had a previous

conviction for housebreaking with intent to assault and assault with intent to cause grievous bodily harm committed on 13 August 2012 for which he was sentenced to two years in prison.

25 The third appellant was born on 14 February 1990. He was thus 23 when he committed the crime and 25 when sentenced. He had a child aged 4 at the time of sentencing. He had one previous conviction, for housebreaking with intent to steal and theft, which he committed on 18 December 2012, for which he was sentenced to corrective supervision and community service.

26 The fourth appellant was 21 when he committed the crime and 23 when sentenced. He had no children. He contributed to the support of his grandmother and young brother by doing piece jobs. He had previous convictions for housebreaking with intent to assault and assault, committed on 13 August 2012, for which he was sentenced to two years imprisonment.

27 There was no basis upon which it could even be argued that the first, second and third appellants displayed remorse for what they had done. In the case of the fourth appellant, it was argued that remorse should be found from his plea of guilty and the fact that he "did not waste the Court's time". Of course by lying he did waste the court's

time. It was said from the bar that he had lied about the true events because he was "afraid for his life" if he told the truth. There is no evidence that he feared for his life. The guilty plea was doubtless motivated by the knowledge of the DNA evidence against him. The fourth appellant did not take the court into his confidence. I reject his claim of remorse.

28 Rape is a serious offence. The crime which the four appellants committed was a dreadful one, even by the standards to which those who serve in the criminal courts of this Division have become accustomed. The horror of the crime lies not so much in the actual physical injuries suffered by the complainant. I hope that I shall not be misunderstood when I say that the stab wounds and other abrasions suffered by the complainant during the course of the multiple rapes and even the facial scarring which the regional magistrate observed are relatively mild injuries compared with many cases which this Division has had to judge.

29 The true horror of the crime lies in the way the appellants went about stripping the complainant of her dignity. First they waylaid her. Then they subdued her by violence when she resisted. The stab wounds to the forehead and eyebrow, 1 cm and 3 cm long respectively, were probably inflicted to cause blood to flow into her eyes and put an end

to her resistance without making her unfit for the awful purpose for which they had waylaid her. Then they forced her to go to the pit toilet they had chosen as the scene of their crimes. There was no suggestion that the stab wound to the back, 3 cm long, was caused while the complainant was in the toilet. That wound was probably the result of prodding her with a knife as they drove her towards the toilet. At a stage before they began raping her they stripped her naked. Then they forced her to put her head in the pit toilet bowl. Those inevitably noisome devices are designed for the reception of human waste. By forcing the complainant to lower her head into that toilet, the appellants were telling the complainant that she was less than human, a creature no more significant on the scale of existence than human waste.

30 The appellants planned to kill the complainant after they had finished using her. But through the good deed of Mrs Seleke in alerting the police and the eventual attention of the police to their duty, the evil plan of the appellants was thwarted.

31 Counsel for the fourth appellant submitted that there was no evidence that the complainant suffered any trauma apart from the trauma she suffered while the rapes were actually being carried out. I do not think

that any human being can go through what the complainant endured without suffering trauma for a large part, if not the rest, of her life.

32 Counsel for the appellants submitted that the court ought to have required pre-sentencing reports. But the appellants were adults and were all legally represented at their trial. There was no request for such a report and there was no suggestion from counsel for the appellants of what possible material favourable to the appellants such reports could have produced.

33 The conduct of each of the appellants was nothing less than that of a predator whose prey was a defenceless woman. The public interest demands that such conduct be punished by heavy sentences.

34 The relative youth of the appellants has been advanced as a mitigating circumstance. I have given this aspect careful consideration. But this was not the first time each of them had transgressed the law. Each of them had previously been given a light or extra-custodial sentence. There is nothing on the record to suggest that these earlier sentences had any rehabilitative effect on any of he appellants. There is similarly nothing to suggest that the youth of the appellants rendered them more susceptible to committing these crimes.

35 IN *Matyityi, supra* at para 14, the following was said regarding the youthfulness of an offender:[1]

> 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 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.

36 As I have said, the first appellant was 19 when he committed the crime. The first appellant however admitted to stabbing the complainant, the necessary precursor to the gang rape itself. He was the gang member who accepted the task of killing the complainant

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1 Footnotes omitted

when he had finished with her. There is no suggestion that the conduct of the first appellant was influenced by another gang member, even though he was the youngest. He had a previous conviction for a violent crime. I do not consider it will in these circumstances be appropriate to sentence the first appellant more leniently than the other, older gang members.

37 The youth of an offender may in a proper case show that the offender is immature and therefore suitable material for rehabilitation. The appellants all declined to place evidence in this regard before the court or were unable to do so because no such material existed. There is simply nothing on the record to show that the young men who committed these crimes have any prospects of being rehabilitated. 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 not to have been killed by the appellants. Unless the appellants are removed from society, their next victim may not be so lucky.

38 For these reasons, I am entirely unpersuaded that there are substantial and compelling circumstances which would in this case justify a deviation from the prescribed sentence of life imprisonment. 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. This permanently removed each of the appellants from society. Inevitably in a case such as this, retribution and deterrence weighed more heavily than what I have found to be the highly improbable prospect of rehabilitation in relation to each of the appellants.

39 Indeed, had I heard this case as of first instance and untrammelled by the strictures of the minimum sentencing regime, I would have sent each of the appellants to prison for life for what he did.

40 I propose that this court makes the following order:

The appeals of each of the appellants are dismissed and the convictions and life sentences imposed by the court below are confirmed.

NB Tuchten
Judge of the High Court
19 June 2017

I agree. It is so ordered.

V Tlhapi
Judge of the High Court
June 2017

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