IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: A497 / 2015
4/8/2016

In the matter between:

BONGANI RADEBE Appellant

and

THE STATE Respondent

JUDGEMENT

MAKHUBELE AJ

INTRODUCTION

[1] On 13 March 2012, Bongani Radebe ("the Appellant"), then a 21 year old male, was convicted and sentenced to a term of life imprisonment and a further 12 years imprisonment by the Sebokeng Regional Court Magistrate, Mr A.J Von Wielligh ("the Presiding Officer") for the rape and attempted murder of one P. M., a 22 year old woman ("the complainant").

[2] In Count 1, it was alleged that the Appellant contravened *"the provisions of Section 3 read with Sections 1, 56,57, 58, 59, , 60 and 61 of the Sexual Offences (Act 32 I 2007)*

(read with sections 92(2),94,256,257 and 281 of the Criminal Procedure Act 51/ 1977 and the provisions of Sections 51(1) or (2) and Schedule 2 Act 105 of 1997, as amended by the Criminal Law Amendment Act 38 of 2007 in that on or about 16/ 12/2009 and at or near EVATON in the Regional Division of GAUTENG the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, P. M., 22 year old female person by PENETRATING HER VAGINA WITH THEIR PENISES [sic!] without the consent of the said complainant."

[3] In count 2, it was alleged that on the same date and place as in Count 1, the Appellant *"did unlawfully and intentionally attempt to kill P. by STABBING HER REPEATEDLY ON HER NECK, BACK AND BODY, AND PUSHING HER INTO A STREAM"*

[4] His application for leave to appeal was refused. He then filed a petition in terms of Section 309C of Act 51 of 1977 for leave to appeal against his conviction and sentence.

[5] His petion to appeal the conviction was refused and he was granted leave to appeal against the sentence only.

[6] The record of proceedings was reconstructed from the bench notes of the Presiding Officer. Both the Public Prosecutor and the Appellant's defence attorney confirmed that the reconstructed record was correct.

[7] It appears from the reconstructed record that the Appellant was legally represented throughout the trial. It is also evident that he had a fair trial in that he was advised of the consequences of the prescribed minimum sentencing regime at the time when the charges were put to him.

THE RELEVANT FACTS

[8] The Appellant was convicted on the following factual matrix;

8.1. The complainant was walking home alone at about 23:45 after attending a braai when she passed a group of about 7 males. Two of them followed her and

one of them called her name. She looked back and realized that it was the Appellant, whom she knew. They walked with her whilst the Appellant asked questions about where she was coming from. The Appellant and the unknown man talked between themselves in a language she did not understand.

8.2. The unknown man suddenly pulled her by her hand. She asked him why he was pulling her. He told her that she was going to have sex with the both of them. He let go of her hand. She ran away. He gave chase, tripped her and she fell. The Appellant arrived where they were. They both hit her with open hands and dragged her to the bushes whilst she was screaming. They threatened to kill her if she did not keep quiet. The Appellant held her hands whilst the other man undressed her.

8.3. The Appellant ordered her to lie on her back, which she did. He had sexual intercourse with her. The other man did too. After they finished, the Appellant suggested that they should kill her because if they did not, she would lay charges against them. The other man then started to stab her. She attempted to run, but the other man got hold of her and stabbed her on the back several times.

8.4. She tried to fight back but he stabbed her hand. She fell down. They thought she was dead. The Appellant's accomplice pushed her into a nearby stream. She waited until their voices died down, then got up and ran to a nearby house to seek help. She knocked at the door but no one answered. She ran to her friend's house. Her friend's mother opened the door. She fell down and was not able to communicate. They called an ambulance but it did not come. In the morning her friend took her to a clinic. She was transferred to the hospital.

8.5. Two other witnesses were called to testify and they confirmed her physical state she arrived at her friend's house.

8.6. The medical Form (J88 Form) was accepted as an Exhibit. Several lacerations of varying lengths on various parts of her body such as back, hip, shoulder, legs and fingers were noted. It was also noted that there was "Clinical

evidence of physical assault (multiple lacerations + left lung pleural effusion. Blood and air at the left lung". There was also evidence of forced vaginal penetration.

[9] On the Rape charge, the Appellant admitted that he had sexual intercourse with the complainant on the day in question. His defence was that the intercourse was consensual. His version was that they were lovers. On the night in question they met at a tavern. They had a discussion about the Appellant's relationship with her friend. At some point the police conducted a raid in the tavern. The Appellant asked the complainant that they should leave to drink elsewhere. At first she was reluctant to leave but agreed after he promised to buy her liquor. They went to his place of residence as he wanted to change his shirt. They discussed the status of their relationship whilst seated on the bed. One thing led to another and they ended up having intercourse. They left to attend a party that complainant was at before she went to the tavern. They stayed there for about two hours. The complainant went to sit with her friends. The Appellant sat next to them, but she later disappeared. Her friends told him she was outside. He went to look for her but did not find her. He waited for her until he decided to leave at about 01:00.

9.1 He denied the allegations with regard to Count 2.

[10] The Appellant's version was rejected by the Presiding Officer and he was accordingly convicted as charged on both counts.

THE SENTENCE IMPOSED AND FACTORS THAT WERE TAKEN INTO ACCOUNT

[11] The State proved one previous conviction of robbery that was committed on 11 September 2009 for which he was sentenced to three (3) years imprisonment. The whole sentence was suspended for a period of five years on certain conditions that were not placed on record. The circumstances under which he was convicted were also not placed on record.

[12] The personal circumstances that were placed before the trial court were that the Appellant was;

12.1. 21 years old;

12.2. "not married, but he has a wife and one child"[1]

12.3. unemployed; and

12.4. has only passed standard 6 at school.

[13] The trial court also took into account the fact that the complainant was raped by more than one person and that in terms of Section 51(1) of the Criminal Procedure Act the prescribed minimum sentence of life imprisonment was mandatory unless there were compelling and substantial circumstances to justify a lesser sentence.

[14] There is no indication in the reconstructed record that the legal representatives made any submissions with regard to what would constitute compelling and substantial circumstances.
The Presiding Officer simply indicated that he did not find any such compelling and substantial circumstances.

[15] Other factors that appear to have been taken into account are that:

15.1. The Appellant and the unknown male overpowered the complainant with the aim of raping her and thereafter brutally attacked her with the aim of killing her so that she cannot lay a charge against them.

15.2. The Appellant committed these offences a year and 3 months after he received a suspended sentence for robbery. This shows that he has no respect for the life or bodily integrity of other persons.

15.3. He did not show remorse for his actions.

[1] This is a contradiction. It appears from later pronouncements by the Presiding Officer that he had what he referred

GROUNDS OF APPEAL AND FINDINGS THEREOF

[16] Counsel for the Appellant, Ms Van Wyk, submitted that the Appellant's legal representative failed to address the court with regard to the factors that would have constituted compelling and substantial circumstances to justify deviation from the minimum prescribed sentence of life imprisonment. She referred us to the matter of **S V Mokgara 1015(1) SACR 634 (GP)** to advance her submission that the Presiding Officer had a duty under the circumstances, to put pertinent questions to the Appellant's legal representative to determine facts that may have proved the existence or non-existence of compelling and substantial circumstances. We were also referred to the matter of S v **Magano 2014 (2) SACR 423 (GP)** for a contention that sentencing an accused to life imprisonment requires the presence of enough information to enable the court to arrive at a balanced verdict.

[17] Whilst I agree with the principles in the cases that we were referred to, the submission that no such questions were put to the legal representative may not be a fact, in view of the fact that the record was reconstructed.

I must hasten to add that in the context of the reasons that were given for the sentence, the Presiding Officer does not appear to have considered whether any of the factors that were placed before him in mitigation of sentence would qualify as compelling and substantial circumstances. In that regard, he misdirected himself. He also did not consider whether the age of the Appellant was a factor that he should take into account when considering what would constitute compelling and substantial circumstances.

[18] It was also argued on behalf of the Appellant that the period that he spent in prison whilst awaiting finalization of the proceedings should have been taken into account. He was arrested on 26 October 2010 and remained in custody until he was sentenced on 13 March 2012. He spent two years in custody as an awaiting trial prisoner. His counsel contended in the heads of argument that the sentence should be antedated to 13 March 2012 in terms of section 282 of the Criminal Procedure Act

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to as a "life partner".

[19] A further submission was that the Appellant was 20 years old when he committed the offences in question. He can be rehabilitated. Even if a longer prison terms is imposed, the fact that there is hope for a parole will have a positive effect in his rehabilitation whilst he is in prison.

[20] Ms Van Wyk argued further that the robbery was committed in 2008 when he was still a minor. It was conceded though that the Appellant deserves a custodial sentence because the previous record, though not strictly relevant, shows that he has a propensity to violence. Furthermore, a suspended sentence that was imposed on him does not appear to have had any positive effect on him.

LEGAL PRINCIPLES

[21] It is trite that the appeal court can only interfere with the discretion of the lower courts to impose sentences only if:

21.1. There was an irregularity during the trial or sentencing of an accused person.

21.2. The lower court misdirected itself in respect of the imposition of the sentence.

21.3. The sentence imposed by the lower court could be described as disturbingly or shockingly inappropriate.

[22] The question is not whether the sentence is right or wrong, but rather whether the lower court exercised its discretion properly and judicially.[2]

[23] The proper approach to sentencing under circumstances where the provisions that created a mandatory minimum sentencing regime, Section 51(3)(a) of Act 105 of 1997 are applicable was formulated by **Marais JA** in the leading case of **S v Malgas**

[2] S v Pillav 1977 141 SA 531 (A) at p 535 E-G

(117/20001 (20011 ZASCA 30; (2001) 3 All SA 220 IA! 119 March 2001)[3].

In Paragraph 25, Marais JA summarized the proper approach by examining the provisions that created the minimum sentencing regime as well as the specific offences referred to in Part 1 of Schedule 2. With regard to the latter, the learned Judge stated that the court's discretion in imposing sentence has been limited, and not eliminated. The usual factors that a trial court would take into account when sentencing are still applicable, such as proportionality of the sentence to the crime, balancing the various competing interests, and the nature of the offence.

[24] In the appeal before us, the Presiding Officer failed to evaluate the mitigatory circumstances of the offence and weigh them against the aggravating factors. This is a misdirection that entitles the appeal court to intefere in the sentence imposed by the Presiding Officer.

The personal circumstances of the appellant, such as his age, constitute substantial and compelling circumstances that the Presiding Officer should have taken into account to determine whether he should depart from imposing the minimum sentence or not.

[25] In the matter of **Mudau v State[4], MAJIEDT JA[5]** undertook an analysis of recent court decisions to illustrate the approach adopted by our courts on the issue of substantial and compelling circumstances in view of the prescribed minimum sentences regime. There appears to be consensus that each case should be judged on its own merits and that the correct question to ask is whether life imprisonment is the appropriate sentence under the circumstances of each case.

[26) Considering or taking into account factors such as the youthfulness of an accused person does not in my view minimize the fact that rape is a serious offence. It is a reality that needs to be considered by a trial court to reach a correct conclusion with regard to the question whether there should be a deviation from the prescribed minimum sentencing regime. It is not to say that the complainant deserved or invited the rape.

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[3] reported in the South African Criminal Lar Reports as S V Malgas 2001 (1) SACR 469 (SCA)
[4] 2013 (2) SACR 292 (SCA)
[5] MTHIYANE DP, CACHALIA JA, ERASMUS and SALDULKER AJJA concurring.

Duty of a sentencing court

[27] In the matter of **S v Siebert**[6]**,** the duty of a sentencing court was described as follows *"Sentencing* is *a judicial function sui generis. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court"*

[28] In **S V Vilakazi 2012 (6) SA 353 (SCA)**[7], the duty of a court before passing sentence was formulated as follows:

> *"It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it* is *incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence* is *indeed proportionate to the particular offence. The Constitutional Court made it clear that what* is *meant by the 'offence' in that context (and that* is *the sense in which I will use the term throughout this judgment unless the context indicates otherwise) consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. '*[22]
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> *If a court is indeed satisfied that a lesser sentence* is *called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court* is *bound to impose that lesser sentence. That was also made clear in Malgas, which said that the relevant provision in the Act 'vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed . And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which 'justify'...it'*[23]

[6] 1998 (1) SACR 554 (SCA) at 558j-559a.

Youthfulness of the Appellant

[29] Schoeman AJA[8] re-iterated the principles in this regard in the following paragraphs of his judgment in the matter of **Netshivhodza** v S **(962/ 2013) (2014) ZASCA 145 (26 September 2014)[9]**

> *"[13] In S v Mabuza & others **[4]** Cachalia JA said the following when discussing the position of youthful offenders who have attained the age of 18 years* in *the light of s 51(2) of the Act:*
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> '. . . . *So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer per se a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other factors are present. A court cannot, therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it would deny the youthful offender the human dignity to be considered capable of redemption.'*
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> *[14] In S v Matyityi **[5]** Ponnan JA said the following when dealing with the 'relative youthfulness' of an appellant.*
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> *'The question, in the final analysis,* is *whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce 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.* '
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> *[15] The aspect of the appellant's youthfulness was not explored to determine*

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[7] at paragraph 15
[8] Cachalia and Willis JJA concurring

the degree of his maturity and the influence, or lack thereof, of his fam ily and home environment and in that way to assess his moral culpability. It was clear however that the appellant did not live the life of an adult: he lived at home, the income from his temporary work of washing cars at a local school was ploughed back into his large family and was not used to support himself or any dependants. This sense of obligation might also be indicative that the appellant is a useful member of society that fulfils his obligations to his family and thereby to society as a whole.

[16] The appellant is young and there exists a real possibility of rehabilitation. There has been no other indication that he is a recidivist without hope of becoming a useful member of society. He indicated through his legal representative that he will not place himself in a similar position again.

[17] ..... .

[18] In Rammoko v Director of Public Prosecutions [6]. Mpati JA stated:
'Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. '

[19] Furthermore, in S v Mahomotsa [7] it was set out that there are bound to be different degrees of seriousness of rape even in cases where life imprisonment is the prescribed minimum sentence in terms of the Act. It is the duty of the court to consider all those factors before it imposes sentence"

Period spent in custody whilst awaiting trial

[30] In the matter of **S V Vilakazi[10], NUGENT JA[11]** stated the following:

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[9] footnotes were omitted.
[10] 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA)
[11] STRECHER, MLAMBO, MAYA JJA and HURT AJA concurring

"[60] There is *one further consideration that must be brought to account. The appellant was arrested on the day the offence was committed and has been incarcerated ever since. At the time he was sentenced he had accordingly been imprisoned for just over two years. 56 While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial* is *not then brought to account in any custodial sentence that* is *imposed. In the circumstances I intend ordering that the sentence - which for purposes of considering parole* is *a sentence of fifteen years' imprisonment commencing on the date that the appellant was sentenced -* is *to expire two years earlier than would ordinarily have been the case.*

[61] The appeal against sentence is *upheld. The sentence imposed upon the appellant* is *set aside and the following sentence* is *substituted:*

> *'The accused* is *sentenced to fifteen years' imprisonment from which two years are to be deducted when calculating the date upon which the sentence is to expire.* '

[31] Subsequent SCA judgments appear to discourage this mechanical method of deducting the number of years spent whilst awaiting trial. The correct approach it would seem, is to consider whether such period should be taken into account when considering the appropriate sentence that should be imposed. There is no rule to determine the weight to be given to a period that an accused person spent whilst awaiting finalization of his trial. Each case is decided having regard to all the relevant circumstances. It is not a mechanical calculation of time actually spent, but whether, like any other factor, the time spent should be taken into account. **(Director of Public Prosecutions v Gcwala (295 / 13) [2014] ZASCA 44** (31 March 2014 at para.18 and 19). Lewis JA referred to an earlier SCA decision in the matter of ***Radebe and Another*** *v S* ***(726 /12) {2013/ ZASCA* 31** *(27* ***March 2013);*** *2013 (2) SACR 165 (SCA) (27 March 2013)* where it was held that there was no rule of thumb in respect of calculation of the weight to be given to such period.

CONCLUSION

[32] Although trial courts are not obliged to call for pre-sentence reports, the same purpose would have been achieved had the Presiding Officer played a more active role during the sentencing stage with a view to establish whether life imprisonment was an appropriate sentence.

[33] More emphasis was placed on the fact that two persons raped the complainant. As a result of this, the Presiding Officer appear to have been compelled to impose a life sentence.

[34] The fact that the Appellant was convicted of a crime of robbery whilst he was still in his teens should have sounded warning bells on the Presiding Officer to want to know more about his background and possibility of rehabilitation.

[35] It is also clear from the evidence that the unknown man that was not apprehended was the main instigator. He chased the complainant, tripped her and undressed her.

[36] Besides the rape that in itself is a humiliating and degrading act, the complainant was seriously injured. She was pushed in a stream and left for dead. I cannot find any reason to interfere with the sentence that was imposed in respect of count 2 (attempted murder).
The Appellant deserves a severe punishment, but one that will not confine his normal life to a prison cell.
His counsel conceded that a custodial sentence should be imposed.

[37] He was sentenced in 2012. Remitting the matter back to the trial court will not serve a purpose, more so because the trial record was lost and reconstructed from the bench notes.

[38] Accordingly, this court is in a better position, having found that there were several misdirections, to impose sentence afresh.

[39] Under the circumstances, I propose the following order:

39.1. The appeal with regard to sentence on count 1 is upheld and the sentence

of the trial court is set aside and substituted as follows:

"the Accused is sentenced to 15 years imprisonment"

The sentence is ante dated in terms of section 282 of the Criminal Procedure Act to 13 March 2012.

39.2. The appeal with regard to sentence in Count 2 is dismissed and the sentence of the trial court is hereby confirmed.

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MAKHUBELE AJ

Acting Judge of the High Court

I agree, and it is so ordered

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E.M KUBUSHI

Judge of the High Court

APPERANCES:

Appellant:	**Advocate LA Van Wyk** Pretoria Justice Centre
The State:	**Advocate C. Pruis** **The Director of National Prosecutions, Pretoria**