IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: A717/2015

17/8/2016

In the matter between:

FRANK MATOME MASEDI First Appellant

JEFFREY SELAMOLELA Second Appellant

and

STATE Respondent

JUDGMENT

HF JACOBS, AJ:

[1] The appellants were convicted on a count of rape of a 14 year old minor, Ms T, in the Regional Court at Mangkweng. The case was referred to the High Court for sentence in terms of section 51(2)(b) of the Criminal Procedure Act of 1977 under the then prevailing statutory dispensation. On 2 September 2004 Claassen J sentenced both appellants to life imprisonment. The first appellant now appeals both his conviction and sentence with the leave of the Supreme Court of Appeal. The second appellant appeals his sentence only, also with the leave of the Supreme Court of Appeal.[1] They have both

[1] Leave to appeal was granted to the first and second appellants on 31 March 2015 and 5 August 2014 respectively.

been serving their sentences of life imprisonment since 2 September 2004, just short of twelve years.

[2] Both appellants had legal representation before the Regional Court and the High Court. The first appellant pleaded not guilty and admitted in his plea explanation to having had consensual sexual intercourse with Ms T on another date and stated that Ms T was his girlfriend at the time.

[3] The second appellant also pleaded not guilty and denied having had sexual intercourse with Ms T. The second appellant further admitted in his plea explanation having been present at the scene of the crime and stated that he is a friend of the first appellant and explained his presence at the scene of the crime on the basis that he accompanied the first appellant when the first appellant fetched Ms T at the school where she was a pupil.

[4] Immediately after noting the appellants' pleas of not guilty and their plea explanations the prosecution enquired from the appellants' legal representatives whether they would be prepared to admit that Ms T was at the time of her alleged rape 14 years of age and whether they would be prepared to admit the content of the Form J88 medical report compiled by the doctor who examined Ms T. The appellants' legal representatives had no objection and the trial proceeded, *in camera,* with the reading of the content of the Form J88 into the record and handing the document in as an exhibit.

[5] The Form J88 records that on 27 November 2002 Dr M L Modiba examined Ms T after a complaint that she had been raped. The doctor found upon examination her hymen to have been tom left posterior and that her labia minora was blood stained and bleeding, the frenulum of the labia minora showed a fresh tear and was reddish in colour. Her vagina was tender with mild bleeding and the doctor concluded that Ms T was sexually assaulted with penetration causing a tom hymen. The injuries were consistent with those often present after rape.

[6] Ms T's evidence was that on the day in question she went to school to return her schoolbooks. It was the end of the school examination. It was in the afternoon. When Ms T left the school gate the two appellants were at the gate. Ms T knew the two

appellants from the neighbourhood although they were not friends. With the two appellants .was one V P also known as S. S testified for the prosecution.

[7] When Ms T left school the second appellant took her schoolbag and the first appellant said that she was to accompany the three young men and she was told to tum towards S's place. Ms T refused to tum from her route whereupon the first appellant took out a knife and forced Ms T to go where he told her. Ms T and the first appellant then went into the house of S. Ms T did not want to go but the first appellant forced her. He threatened her with assault and to kill her.

[8] Once the first appellant, Ms T and S were in the house S went to the kitchen to clean up and the first appellant took Ms T into the bedroom. That is where Ms T testified the first appellant undressed her. The second appellant was not there at the time. He went to his house which was not far from there to put away his jacket. The first appellant then raped Ms T. The second appellant entered the room later and also raped Ms T. She did not scream. She was told to be quiet and threatened by the first appellant who had a knife.

[9] S was in the house all the time albeit in another room. Ms T thereupon dressed herself and left for home where she told her sister, J, of her ordeal who then phoned their mother. J was called as a witness by the prosecution and corroborated Ms T's evidence in all material respects.

[10] Ms T denied that the first appellant was her boyfriend as stated in his explanation of plea and denied that she consented to having sexual intercourse with him. Ms T's evidence about her injuries was consistent with the findings recorded by the Form J88.

[11] S did not witness the rape. He did see the first appellant enter the bedroom with Ms T and also saw the second appellant arrive a few minutes later. The second appellant told S when S warned him of potential trouble that may follow should he have intercourse with Ms T that he (S) *"knows nothing"* and that he (second appellant) and the first appellant have *"been trying* cases" for a long time. When the first appellant left the bedroom he called, according to S, the second appellant after which the second appellant entered the bedroom where the second appellant raped Ms T.

[12] The appellants did not testify in the Regional Court. The evidence of Ms T is, therefore, unchallenged. On appeal it was submitted on behalf of the first appellant that Ms T and the first appellant had consensual sexual intercourse and that the absence of evidence of Ms T sounding alarm supports such an inference. I do not agree mainly for three reasons. First, the absence of any screaming by Ms T is not inconsistent with the conduct of a child of 14 being threatened at knife point to remain quiet during an assault of this kind and, second, it was never put by the legal representative of the first appellant to Ms T that intercourse was consensual. Third, the appellants never testified and Ms T's evidence stands uncontroverted. It was further submitted on behalf of the first appellant that the absence of evidence by S about the appellants (or any of them) holding a knife en route to S's house, casts doubt over the reliability of the evidence of Ms T. I cannot agree with the submission. S throughout his evidence stated that the first appellant and Ms T walked some distance from him or they were, as S put it, *"being aside"* or walking and standing *"behind us".* The absence of evidence by S that he noticed a knife does not lend support for a finding that the direct evidence of Ms T should in that respect be rejected as improbable.

[13] It must be borne in mind that the evidence of Ms T about the knife was not challenged on behalf of the appellants during cross-examination. On behalf of the first appellant the evidentiary value of the Form J88 was challenged on appeal despite the consensual use of that evidence which I have mentioned earlier. A similar challenge was directed at the acceptance of the age of Ms T at the time of the rape. It is well-established that an accused is bound by the admissions made by him or on his behalf unless it was made as a result of a *bona fide* mistake or without proper instruction.[2] The first appellant's challenge is not based on any *"mistake"* or absence of *"proper instructions"* but based on the absence from the record of reference to terminology such as *"formal admission in* terms *of section 220 of the Criminal Procedure Act".*

[14] Formal admissions of facts are not dependent on the use of certain hackneyed expressions. The record shows in my view the reasons for the admissions made by the appellants' legal representatives, its context and purpose. The age of Ms T and her

[2] S v Vilikazi an unreported SCA case number 284/10: 30 September 2010.

injuries were in any event confirmed by her in evidence. There is no merit in the first appellant's challenge of the findings of the Regional Magistrate in this respect. The Regional Magistrate's reasoning and judgment are sound and the conviction of the two appellants should stand.

[15] I now turn to the appeals against the sentences of life imprisonment. The record does not show that the appellants were forewarned about the statutory provisions pertaining to minimum sentences. That constitutes an irregularity in the given context.[3] Under the circumstances it is expected from this court to consider the sentence afresh, which ineluctably means the setting aside of the sentence of the trial court, and conducting an inquiry on sentence as if it had not been considered before. While doing so this court should disregard what the trial court said in respect of sentence and interrogate and adjudicate afresh the triad in respect of sentence as stated in *Zinn.*[4]

[16] Since the advent of the regime providing for obligatory sentences our Courts have in *Malgas,*[5] *Dodo*[6] and *Vilakazi*[7] criticised, explained and interpreted the provisions of section 51 of Act 105 of 1997. The convenient 10 point overarching guideline at paragraph [25] of *Ma/gas* records, with the endorsement of the Constitutional Court in *Dodo* (par [11]) a practical method to be employed by all judicial officers faced with the application of section 51. The section's application requires refinement and needs to be particularised on a case by case basis. Section 51 has as its aim to steer sentencing along the path that ensures *"that consistently heavier sentences* are *imposed in relation to serious crimes covered by section 51".*[8]

[17] In *Vilakaz*[9] the Supreme Court of Appeal added:

> *"It is clear from the terms in which the test was framed in Ma/gas and endorsed in Dodo that it is incumbent upon* a *Court in every case, before it imposes* a

[3] Machongo v S (20344/14 [2014) ZASCA 179 (21 November 2014) and the Full Court decision in Lebang v S (A173/2013 of 21 April 2015, High Court Gauteng Division, Pretoria)).
[4] S v Zinn 1969 (2) SA 537 (A).
[5] S v Malgas 2001 (2) SA 1222 (SCA).
[6] S v Dodo 2001 (3) SA 382 (CC).
[7] S v Vilikazi 2012 (6) SA 353 (SCA).
[8] Dodo par (11).
[9] Supra at par (15).

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.*"[10]

[18] In *Vilakazi*[11] the Court considered the proposition that prescribed sentences must be imposed as the norm and are to be departed from only as an exception. The Supreme Court of Appeal rejected the proposition as follows:

"That is not what was said in Ma/gas. The submission was founded upon words selected from the judgment and advanced out of their context. The Court did not say, for example, as it was submitted that it did, that the prescribed sentences 'should ordinarily be *imposed'. What is said is that* a *Court must approach the matter 'conscious [of the fact] that the Legislature has ordained [the prescribed sentence] as the sentence that should ordinarily and in the absence of weighty justification* be *imposed for the listed crimes in the specified circumstances. "*

[19] Claassen J correctly in my view described the crime of rape as serious and has the result of *"persoonlikheidsmoord"* and expressed his concern about the statistical prevalence of the crime in the area of jurisdiction of this court.

[20] In my view the custodial sentence is imperatively called for but I am not convinced that a period of life imprisonment is the only appropriate sentence in the circumstances. The two accused committed these crimes at a reasonably young age and had they been informed of the possible imposition of an obligatory life sentence they could have presented evidence of their prospects of success to rehabilitate themselves over time.

[21] In my view a substantial custodial sentence as I intend to propose would satisfy all the requirements of the triad in *Zinn.*[12]

[22] The first appellant applies for condonation for the late filing of his notice of appeal. In view of what I have mentioned I would propose that he be granted the condonation

[10] S v Vilakazi supra at [15].
[11] See par (16).
[12] See footnote 4 above.

sought. When the matter was called there was no appearance for the second appellant. We enjoy jurisdiction to consider the second appellants appeal against sentence and the appeal on sentence was fully argued on behalf of the respondent.

[23] In the circumstances I propose the following order:

[23.1] That condonation is granted to the first and second appellants for the late filing of their notices of appeal.

[23.2] The first appellant's appeal against his conviction be dismissed.

[23.3] The first and second appellants' appeals against their sentences of life imprisonment be upheld and the sentences are set aside.

[23.4] The life sentence imposed by the court a *quo* in respect of the first appellant be substituted with a sentence of 18 years' imprisonment.

[23.5] The life sentence imposed by the court a *quo* in respect of the second appellant be substituted with a sentence of 18 years' imprisonment.

[23.6] The sentences are antedated to 2 September 2004.

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H F JACOBS

ACTING JUDGE OF THE GAUTENG HIGH COURT

I AGREE

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MURPHY JR

JUDGE OF THE GAUTENG HIGH COURT

I AGREE

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MABUSE P M

JUDGE OF THE GAUTENG HIGH COURT