IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

DATE **SIGNATURE**

Case Number: A962/2011

In the matter between: DATE: 23/8/2016

JULIUS NDLOVU Appellant

And

THE STATE Respondent

JUDGMENT

MAKUME J WITH HIM NKOSI AJ CONCURRING

[1] This is an appeal against conviction and sentence of life imprisonment imposed by the Regional Court Nelspruit on the 5th of May 2010.

[2] The appellant a 44 years old married man pleaded guilty to a charge of rape in contravention of the provisions of Section 3 read with Section 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act read with the provisions of Section 51 and Schedule 2 of the Criminal Law Amendment Act No. 105 of 1997.

[3] A statement in terms of Section 112(2) of the Criminal Procedure Act No. 51 of 1977 was read into the Court record by the appellant's legal representative in which he admitted all the elements of the crime and was duly convicted.

[4] It was whilst the appellant's attorney was addressing the Court in mitigation of sentence that he told the presiding officer that his instructions were that the appellant was under the influence of liquor at the time of committing the offence and then proceeded to say that the appellant told him that he did not know what he was doing at that time. Based on those submissions the Court duly acted in terms of Section 113 of the Criminal Procedure Act and entered a plea of not guilty. The complainant N N N testified *in camera* through a duly sworn intermediary a Ms. N M.

[5] It is common cause that the complainant in this matter was an 11 year old girl and a stepdaughter to the appellant. On the 10th of May 2009 the appellant's wife who is the mother of the complainant was not at home as she was attending a funeral at a place called Mangweni Trust in Mpumalanga.

[6] At about midnight on that day the appellant entered the room where the complainant was asleep with her other two sisters. He removed her to his own room where he undressed her and then carnally penetrated her without her consent. When he had finished he threatened her with death should she report what happened.

[7] Despite this threat the complainant told her mother when she returned home as a result the appellant was arrested. He remained in custody and was never released on bail.

[8] The medical evidence as presented on the J88 form does not indicate any serious physical injuries sustained by the complainant. It however confirmed forced vaginal penetration beyond the hymen.

[9] In her evidence the complainant testified how the appellant came into the bedroom, switched off the lights and turned on the radio to be loud and then proceeded to

rape her whilst closing her mouth with his hand. She told the Court that she felt pain in her private parts but did not sustain any injuries.

[10] The version of the appellant was that on that day he was drunk and when complainant said he was not drunk his counsel sat down and did not dispute the further evidence or version of the complainant. The state's case was closed. The appellant also closed his case without testifying.

[11] I am satisfied that the appellant was correctly convicted as charged and the appeal against conviction should fail.

SENTENCE

[12] This appeal is largely about whether the Court *a quo* was justified in imposing a sentence of life imprisonment or whether a lesser sentence should have been imposed.

[13] The crime of rape has been described in various judgments in our courts as a humiliating, degrading and brutal invasion of the privacy, dignity and person of the victim. The Court in ***S v Chapman*** **1997 (2) SACR 3 (SCA)** went on to say that:

> "Women in this country have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment to go and come from

work and to enjoy peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[14] The appellant was convicted of a very serious crime. However his legal representative at the trial does not seem to have appreciated that the conviction would attract a sentence of life imprisonment. He was casual about handling the trial at that stage and in fact presented no evidence save to tell the Court that the appellant was under the influence of liquor.

[15] The introductory remarks in Hiemstra's *Criminal Procedure on Sentence* reads as follows:

"Sentencing is the most difficult facet of a criminal case. Unfortunately it is the topic about which legal practitioners least learn and consequently with which they are least familiar. Although for the accused it is the most important facet it is often disposed of hurriedly. However sentencing deserves at least as much attention as the consideration of the merits and because it often requires insight and expertise which lawyers do not have the wise presiding officer will when imposing sentence not hesitate to call upon experts to assist."

[16] The appellant's legal representative was asked by the Court to address it on mitigating factors. He replied as follows:

> "No Your Worship I think the defence has covered everything".

He was then asked a pertinent and crucial question that goes to the root of sentencing in accordance with the minimum sentence regime. The question by the Magistrate was as follows:

> "COURT: So are you of the opinion that there are no substantial and compelling circumstances present?
>
> MR ZIYANE: I doubt if there are Your Worship."

[17] After this question and answer the Magistrate proceeded to pass sentence and found that there were no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of life imprisonment.

[18] Section 274(1) of the Criminal Procedure Act enjoins a Court before passing sentence to receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. In this matter the Court should have noticed the incompetency of the appellant's legal representative and stepped in as if the appellant was unrepresented. This much was highlighted by Olivier JA in the matter

of ***S v Siebert*** **1998 (1) SACR 554** at 558-559a-b where the following was highlighted:

> "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 had been placed before the Court. An accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance. If there is insufficient evidence before the Court to enable it to exercise a proper judicial sentencing discretion it is the duty of that Court to call for such evidence."

[19] I am satisfied that in this matter the presiding officer made no attempt to inform himself of evidence that could have assisted him to pass an appropriate sentence. It is clear that in passing sentence the Magistrate had adopted the view that life imprisonment must be passed as a matter of course.

[20] Nugent JA in ***S v Vilakazi*** **2009 (1) SACR 552** at 562 paragraph 21 warned against such an approach when he said the following:

"[21] The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all available evidence and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound." (See also ***S v Mokgara*** **2015 (1) SACR 634 (GP)**).

[21] The appellant's personal circumstances were placed before the trial Court and in my view at the least in the absence of other evidence the trial Court should have applied the test and approached sentence in the manner as laid down by the Supreme Court of Appeal in ***S v Malgas*** **2001 (1) SACR 469 (SCA)** which approach was endorsed by the Constitutional Court in ***S v Dodo*** **2001 (1) SACR 594 (CC)** to be undoubtedly correct. In ***Malgas*** it was made clear that it is incumbent upon a

Court in every case before it imposes a prescribed minimum 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.

[22] In my view the trial Court misdirected itself in finding that there are no substantial and compelling circumstances justifying the imposition of a sentence less than life imprisonment. The personal circumstances of the appellant should have been properly considered to determine if there are such substantial and compelling circumstances. The appellant is a first offender, he pleaded guilty, he is self-employed and earned R4 000 per month. He showed remorse by pleading guilty in the first place. All this the court failed to take into consideration and thus misdirected itself in arriving at a decision that life imprisonment was the only appropriate sentence.

[23] The complainant testified that she only felt pain in her private parts other than that there is no evidence of any physical violence having been used to make her succumb to the appellant's demand. By so saying this Court is not undermining or playing down the fact that the complainant was traumatised and still fears the appellant. However the Court was not presented with any evidence to indicate whether the complainant will suffer from any long term psychological effects.

[24] In ***S v Ngomane*** **2012 (2) SACR 474 (GNP)** the court held that where a trial Court is dealing with minimum sentence in such cases it is expected that the Magistrate should canvass what the nature and extent of the injuries if any are.

[25] In conclusion it is so that a Court must bear in mind that life imprisonment is the ultimate penalty and should be lightly imposed. The appellant was a first offender and there is no evidence to indicate that he is not a good candidate for rehabilitation and in my view the appeal against sentence ought to succeed.

[26] In the result I propose the following order:

(a) The appeal against conviction is dismissed.

(b) The appeal against sentence is upheld.

(c) The sentence of life imprisonment is set aside and substituted with the following:

(i) The accused is sentenced to 18 years imprisonment.

(ii) The sentence of 18 years is antedated to the 5th of May 2010.

Dated at **Pretoria** on this the **19th day of August 2016.**

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M.A. MAKUME

JUDGE OF THE HIGH COURT

I agree

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N. NKOSI

ACTING JUDGE OF THE HIGH COURT

CASE NO: A962/2011

HEARD ON: 18 August 2016

FOR THE APPELLANT: ADV. L.A. VAN WYK

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. J.P. VAN DER WESTHUYSEN

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 23 August 2016