



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 962/2013

In the matter between:

NETSHIVHODZA NDIVHUWO CALVIN

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Calvin v The State* (962/2013) [2014] ZASCA 145 (26 September 2014)

Coram: Cachalia and Willis JJA and Schoeman AJA

Heard: 9 September 2014

Delivered: **26 September 2014**

Summary: rape – complainant 6 years old – life imprisonment – youthfulness of the appellant – whether substantial and compelling circumstance justifying lesser sentence

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Lukoto J sitting as court of first instance):

- 1 The appeal is upheld.
- 2 The sentence imposed upon the appellant is set aside and the following sentence is substituted:

‘The accused is sentenced to undergo 20 years’ imprisonment.’

- 3 The sentence is antedated to 5 October 2005.

JUDGMENT

Schoeman AJA (Cachalia and Willis JJA concurring)

[1] The appellant was charged with the rape of a six year old girl in the Limpopo High Court. This crime was committed on 10 March 2005 in Thohoyandou. The appellant pleaded not guilty on 4 October 2005, but was subsequently convicted on 5 October 2005 at the conclusion of the trial in the high court. The provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) read with Part 1 of Schedule 2 of the Act were applicable, as the victim was under the age of sixteen years. The appellant was sentenced to undergo life imprisonment on the same day. He appeals against his sentence with leave of the high court (Makhafola J).

[2] The evidence established that on 10 March 2005 the appellant offered the complainant sweets when she was on her way from school. She refused the offer as she was afraid that the sweets might be poisoned. The appellant then grabbed her and dragged her into a nearby orchard where he undressed and raped her. A young man was drawn to the scene by the complainant's cries. When the appellant saw the young man, he got off from the victim and left. The appellant handed himself over to the police the next day when he heard the police were looking for him.

[3] The salient grounds of appeal are that: (a) the sentence of life imprisonment is shockingly inappropriate and it induces a sense of shock; and (b) the court below should have found that there were substantial and compelling circumstances present that justified a deviation from the minimum sentence.

The judgment on sentence

[4] The appellant did not testify during the trial. No evidence was led during the sentence proceedings and the appellant's personal circumstances were placed on record from the bar. Furthermore, no pre-sentence report was obtained in respect of the appellant nor was an assessment made of the impact of the crime on the complainant or her family.

[5] The court below did not refer to the provisions of the Act at all in the judgment on sentence. There was no investigation to determine whether or not substantial and compelling circumstances were present to deviate from the prescribed minimum sentence of life imprisonment, nor was it established whether the prescribed sentence was proportionate to the particular offence.

[6] In the judgment on sentence the trial court stated that the following personal circumstances were placed on record: ‘. . . your age, your social standing at home, the number of people with whom you stay, your own number

in that family hierarchy, what you do with yourself and how you help to keep the family alive’. This was the only time that the appellant or his circumstances were mentioned in the judgment on sentence.

The legal position

[7] In terms of s 274(1) of the Criminal Procedure Act 51 of 1977, ‘a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed’. This court has in the past stressed the importance of placing as much evidence before the court as possible in respect of the perpetrator, the victim and the circumstances surrounding the commission of the offence.¹ If the defence and the prosecution fail to adduce such evidence, the court is obliged to take steps to receive such evidence in order to determine whether there are substantial and compelling circumstances present.

[8] This court in *S v Malgas*² set out the approach to be followed when sentencing an accused in terms of s 51 of the Act. It was established that the usual, traditional factors that were taken into consideration when imposing sentence are still to be taken into account in determining whether there are substantial and compelling circumstances present. Furthermore, if the sentencing court is satisfied that the circumstances of the case are such that the prescribed sentence would be unjust as it would be disproportionate to the crime, the criminal and the needs of society, it is entitled to impose a lesser sentence. The minimum sentence has been set as a benchmark prescribing the sentence to be ordinarily imposed for specific crimes and should not be departed from for superficial reasons.

¹ *S v Olivier* 2010 (2) SACR 178 (SCA) para 8.

² *S v Malgas* 2001 (2) SA 1222 (SCA) para 25.

[9] In *S v Vilakazi*³ it was set out that the duty of a sentencing court is *inter alia* to establish whether the prescribed sentence is indeed proportionate to the particular offence, having taken into consideration all the circumstances. Nugent JA set out this duty as follows:

‘It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* [*S v Dodo* 2001 (3) SA 382 (CC)] 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.”

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”.

It is clear that the trial court failed to approach sentence in this way and thereby misdirected itself.

On appeal

[10] The judgment in the court below did not mention all the facts that were submitted from the bar. These omitted facts are: the appellant had just turned twenty when the crime was committed; he suffers from asthma; he has no relevant previous convictions and should therefore be considered a first

³ *S v Vilakazi* 2012 (6) SA 353 (SCA) para 15.

offender; and he had been in custody as an awaiting trial prisoner for close on seven months before the trial commenced.

[11] As stated earlier, in this instance there was no enquiry to determine whether substantial and compelling circumstances were present and there was no finding that those factors were absent. The court below furthermore failed to consider whether the prescribed sentence was proportional to the offence. I am of the view that the trial court had insufficient information before it to properly assess, prior to passing sentence, what a suitable sentence should be taking into consideration all the relevant factors. It is not apparent what factors the trial court in fact took into account when passing sentence.

[12] Ordinarily the matter would be remitted to the trial court to gather all the necessary information to enable it to sentence the appellant afresh. Due to the fact that the appellant's case was finalised nine years ago, it would not be feasible to obtain a pre-sentence report at this time. Similarly an impact study into the circumstances of the complainant might also not render an accurate reflection of her position. We have also been informed from the bar that the trial judge had passed away, although this is not a bar to remittal in view of the provisions of s 275(2) of the Criminal Procedure Act. In the interests of justice it would be appropriate to sentence the appellant with the limited information at our disposal at this stage. This approach was accepted by both counsel for the State and the appellant.

[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:

‘. . . . 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

⁴ *S v Mabuza & others* 2009 (2) SACR 435 (SCA) para 23.

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.’

[14] In *S v Matyityi*⁵ Ponnann JA said the following when dealing with the ‘relative youthfulness’ of an appellant.

‘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.’

[15] The aspect of the appellant’s youthfulness was not explored to determine the degree of his maturity and the influence, or lack thereof, of his family 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.

⁵ *S v Matyityi* 2011 (1) SACR 40 (SCA) para 14.

[17] The rape of a girl of six years is always a very serious crime. The fact that an impact report regarding the effect the rape had on her was not obtained, does not detract from the severity of the crime and the fact that it can be accepted that the complainant has suffered psychological harm. But then it must also be taken into account that there were no other physical injuries to the victim apart from a bruise on the labia minora and a partial tear of the hymen with a bit of blood next to the tear. It is fortuitous that the rape was interrupted otherwise her injuries might have been much more serious and the psychological harm might have had a more severe impact if the attack was prolonged.

[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.

[20] The appellant is considered to be a first offender and was in custody for seven months before being sentenced. There was no gratuitous violence in addition to the rape. The aggravating factors that are taken into account are the age of the complainant, the fact that the appellant tried to entice her by offering her sweets and chips and when that did not work, he grabbed and dragged her into the orchard whereupon he raped her. It must have been a terrifying experience as is evident from her screams and the fact that the complainant distrusted the appellant even before he raped her. The appellant violated a

⁶ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) para 13.

⁷ *S v Mahomotsa* 2002 (2) SACR 435 (SCA).

young innocent girl and invaded her person without regard to her privacy, dignity and bodily integrity.

[21] However, it should be remembered that ‘. . . 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’.⁸ I am of the view that a severe sentence is appropriate, taking into consideration all the circumstances of the offence. But the youthfulness of the appellant as a first offender, the time he has spent in custody prior to being sentenced and the possibility of rehabilitation are of paramount importance when assessing the proportionality of the sentence to the offence.

[22] Life imprisonment in my view would be disproportionately harsh in the circumstances.

[23] In the result the following order is made:

- 1 The appeal is upheld.
- 2 The sentence imposed upon the appellant is set aside and the following sentence is substituted:
‘The accused is sentenced to undergo 20 years’ imprisonment.’
- 3 The sentence is antedated to 5 October 2005.

I Schoeman
Acting Judge of Appeal

⁸ *Vilakazi* para 21.

Appearances:

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