THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 394/16

In the matter between:

ZAMUXOLO KAYWOOD **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation:	*Kaywood v S* (394/2016) [2016] ZASCA 179 (28 November 2016).
Coram:	Bosielo, Tshiqi and Dambuza JJA and Schoeman and Nicholls AJJA
Heard:	**3 November 2016**
Delivered:	**28 November 2016**

Summary: Criminal law: appeal against sentences of life imprisonment for rape and 16 years' imprisonment for attempted murder following a gruesome attack on the complainant: Minimum Sentences Act (105 of 1997) applicable: no substantial and compelling circumstances: sentences not disproportionate to the crimes committed: appeal dismissed.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Kgomo JP sitting as court of first instance):
The appeal is dismissed.

JUDGMENT

Dambuza JA (Bosielo and Tshiqi JJA and Schoeman and Nicholls AJJA concurring):

[1] This is an appeal against sentence. The 34 year old appellant, Zamuxolo Kaywood, was convicted by the Northern Cape Division of the High Court, Kimberley (Kgomo JP), of attempted rape and assault with intent to do grievous bodily harm which took place on 8 August 2010, and rape and attempted murder which took place on 1 October 2010. He was sentenced to eight years' and two years' imprisonment respectively for the convictions for attempted rape and the assault with intent to do grievous bodily harm. For the rape and the attempted murder convictions he was sentenced to life imprisonment and 16 years' imprisonment respectively. This appeal is against the two last-mentioned sentences, leave having been granted by the trial court.

[2] The convictions in respect of the attempted rape and assault relate to an incident which occurred at about midnight, on 8 August 2010, or during the early hours of the following morning. The complainant and the appellant knew each other. The complainant had, at some stage prior to the incident, been a girlfriend of the appellant's brother. On the night of 8 August 2010, the complainant and the appellant were at the Greenpoint Tavern in Kimberly. In the early hours of the following morning the complainant asked the appellant to escort her home.

[3] As they walked together the appellant abruptly started assaulting the complainant by slapping her in the face. The complainant fell down and the appellant kicked her repeatedly all over the body as she lay on the ground. She later discovered that she had sustained a fracture of the right ankle as a result of the assault. She was admitted to hospital for a period of two weeks. The appellant had dragged the complainant to the nearby Greenpoint Graveyard where he started undressing her. The complainant screamed for help and two brothers, Daniel (also known as Tokkie) and Boetie, came to her rescue. The appellant and Daniel engaged in a tussle. During the fight, the appellant picked up a stone with which he hit Daniel twice on the head resulting in two open wounds on his face. He also sustained superficial injuries on the face. The appellant then managed to break free and run away. The conviction of assault with intent to do grievous bodily harm related to this assault on Daniel.

[4] About two months after that incident, on 1 October 2010, the complainant in the rape and attempted murder convictions was also attacked by the appellant. She had spent the earlier part of the night at Lovers Tavern, in Kimberly, together with some of her friends. At some stage she left the tavern on her way home. As she walked through the Greenpoint Graveyard she was attacked from behind. She recognised her attacker as the appellant whom she had seen at the tavern. The appellant stabbed her repeatedly until she fell to the ground. Her attempts at fighting back failed.

[5] The appellant then dragged the complainant to one side of the graveyard and placed her under a tree. He undressed and raped her, at the same time warning her not to scream. He raped her twice. On the second occasion he fell off her whilst raping her. The complainant used the opportunity to scream loudly. People came to her rescue. The appellant fled. The complainant lost consciousness and only woke up in hospital.

[6] She sustained 12 stab wounds, five of which were on her face and the rest on her legs. She also sustained human bites and superficial abrasions on her back and legs. Later, her grandmother found her identity book, her clothes, including

underwear, at the scene where she was raped. The bloodied clasp-knife with which the appellant had stabbed her, was also found there.

[7] Regarding the sentences under consideration the State led the evidence of a social worker on the impact of the attack on the complainant. The complainant also gave impassioned evidence on the effect the incident had on her. She described her feelings as follows:

'Daar was tye wat ek gevoel het dat ek wil nie meer lewe nie. Daar was vrae ek my gevra het wat ek nooit antwoorde gekry het nie. Vrae soos hoekom het dit met my gebeur. Vrae soos wat ek gesondig het dat dit met my gebeur, hoekom ek. En in die begin in, was dit baie swaar vir my. Want oral waar ek loop of waar ek gaan, ek dink net dat mense negatiewe dink van die. Tot even as ek moet onderhoude toe gaan van werk ook. Ek dink net die negatiewe goeters dat mense miskien gaan dink die scar in my gesig dat ek 'n rowwe persoon is, en tot in die gemeenskappe waar ek bly. Somtyds daar is mense wat my woorde gee. Enige simpel of enige klein stry wat ek net het met iemand dan gaan ek woorde kry, jy is nie gerape jy is gemis. En tot nou toe mense wat my miskien nie ken nie, baie gaan sê, baie vra my meisie jy is so mooi waar kry jy hierdie hou, is dan jy rof of jy lyk rof. En die seerste van alles vir my is dat ek was 'n persoon van ek het selfvertroue gehad in my. Vandag het ek nie meer daardie selfvertroue in my nie, want ek dink altyd net negatiewe dinge wat mense dink van my. Somtyds as ek moet gaan vir onderhoude en mense respond my nie terug nie of bel my nie terug nie, ek dink net dat hulle [dink] ek is 'n persoon, ek is 'n rowwe persoon. En elke keer, elke keer as die saak nader is dat ek moet hof toe kom, en dan het ek slapelose nagte. Want ek kry jou in drome ook. En dit voel of die een kant van my liggaam voel ek soos Zelda Kramp, aan die een kant ek voel of iets weggeneem is uit my lewe uit.

. . . Tot vandag toe waar jy gespoil het met my gesig, ek kan nie vannag daar is baie goed wat ek kan doen my regterkant van my gesig wat ek nie kan doen met my linkerkant nie. [onduidelik] van jy is nie goed vir die gemeenskap nie. Jy kan dit weer aan iemand anders gaan doen ook. En soos ek vandag hier sit, ek hoop ek wens my laaste ek wil jou nooit weer sien nie.'

The reference to her face related to a stab wound she had sustained on the right side of her face which the treating doctor described as:

'A 3 cm vertical cut being from top to bottom . . . about 2 and a half cm's in front of the left ear. The front part of the wound actually showed a secondary cut which is referred to in

technical lingo as a fish tail it looks like a fish tail indicating that it was most likely due to a single edge bladed weapon that was turned as the cut was caused.'

The doctor's evidence was that this inquiry resulted in damage to complainant's peri-oracular artery as well as the branch of a facial nerve located in the same area, resulting in partial paralysis of the side of the face.

[8] In the court a quo the complainant's grandmother described her experience and feelings on what had happened to her grandchild as follows:

'Daardie klere het so gelyk van die bloed dit het my hart diep seergemaak dit het gelyk my kind is soos 'n bees.'

The evidence of the social worker was a repeat of the sentiments expressed by the complainant above, particularly as to the effect of the scar and the partial paralysis on her face. The social worker's opinion was that the complainant was still traumatised. The complainant had terminated counselling because she believed that 'it [would] open the wounds again'.

[9] Before the court a quo, both the State and the defence were agreed that because of the gravity of the rape, the sentence in respect thereof fell to be determined in terms of the provisions of s 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended (the Minimum Sentences Act). This Act finds application in this case on two grounds: firstly, because the appellant inflicted grievous bodily harm to subdue the complainant in order to rape her, and, secondly, because he raped her twice. In terms of the Minimum Sentences Act, the applicable sentence was life imprisonment for the rape conviction. The court could, however, deviate from the prescribed sentence if it found that there were substantial and compelling circumstances,[1] or that the sentence of life imprisonment was exceedingly harsh in the circumstances.[2]

[10] The State and the defence were also in agreement that no substantial and compelling circumstances existed in this case. The court a quo found none and sentenced the appellant accordingly. Curiously, despite the submissions made

[1] *S v Malgas* 2001 (1) SACR 469 (SCA) para 25; S 51(3) of the Minimum Sentences Act.
[2] *S v Fhetani* [2007] SASCA 113; 2007 (2) SACR 590 (SCA) para 5.

before the court a quo during sentencing, the appellant launched an application for leave to appeal.

[11] At the hearing of that application, the court a quo was of the view that it had erroneously taken into account the appellant's superannuated two previous convictions. On 21 April 1999 the appellant had been convicted of assault with intent to do grievous bodily harm and had been sentenced to a fine of R600 or three months' imprisonment. The sentence was suspended for a period of five years on certain conditions. About three and a half years thereafter, on 11 September 2002 (within the period of suspension) the appellant was convicted of attempted murder and was sentenced to a fine of R1 000 or 100 days' imprisonment. In considering the two previous convictions when sentencing the appellant, the court a quo took the view that they had not been superannuated. It appears from the record that on reconsideration, the court took the view that it should have sentenced the appellant as a first offender.

[12] Before us, both the State and the appellant's counsel, again, made the principal submission that there are no substantial and compelling circumstances in this case. Both supported the sentence imposed by the court a quo. Significantly, it was submitted on behalf of the appellant that the misdirection of the trial court did not vitiate the sentence imposed. But counsel for the appellant also submitted that the appellant's personal circumstances as tendered before the court a quo could constitute substantial and compelling circumstances when considered together with the fact that he was a first offender when he was sentenced. I do not agree.

[13] It is true that under s 271A of the Criminal Procedure Act 51 of 1977 (the CPA) the appellant's previous convictions fell away after a period of 10 years from the date of conviction. The court a quo sentenced the accused on 26 June 2013. Section 271A of the CPA provides:

'Where a court has convicted a person of-

(a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but-

(i) has postponed the passing of sentence in terms of section 297(1)*(a)* and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297(1)*(c)*; or

(b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.'

As apparent from paragraph 11 above, the sentences imposed in respect of the appellant's 'previous convictions' were lighter than those stipulated in s 271A. The appellant was indeed entitled to be sentenced as a first offender.

[14] However, the error committed by the court a quo did not vitiate the sentence imposed. Neither do the appellant's personal circumstances. The appellant was 31 years old when he was sentenced by the court a quo. He would have been 29 years old when he committed the offences under consideration. He was single. The trial court accepted that he had a one year old child despite the fact that he had been in prison, awaiting trial, for the thirty months preceding the trial. He had gone up to Grade 7 at school and held casual employment.

[15] The appellant's personal circumstances pale against the abhorrent nature and level of cruelty with which he committed the crimes under consideration.[3] Any lesser sentence would not be justified. I have already set out the injuries sustained by the appellant and the impact thereof on her. The offences committed by the appellant were particularly abhorrent. First, he inflicted untold pain on the complainant, and then when she must have been writhing in pain, soiled with dirt and blood, he performed one of the most degrading acts on her. As a result of his exceedingly cruel conduct, the complainant was left permanently, physically and emotionally scarred. All this, to satisfy his lust.

[3] *S v Solomon & Another* 2008 (2) SACR 149 (E).

[16] Consequently, it is my view that in this case a departure from the minimum prescribed sentence would be nothing short of maudlin sympathy.

The appeal is dismissed.

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N DAMBUZA
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	A van Tonder Instructed by: Kimberley Justice Centre, Kimberley
For the Respondent:	K M Kgatwe Instructed by: Director of Public Prosecutions, Kimberley