Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number A 17/2010

In the matter of:

THEMBANI SOMTA First Appellant

LOLO SIKEYI Second Appellant

Versus

THE STATE Respondent

Judgment: 6 DECEMBER 2010

MIA AJ

[1] The first and second appellants were charged and convicted of housebreaking with intent to steal and theft and rape. The first appellant was also charged and convicted of robbery with aggravating circumstances and the second appellant was charged and convicted of a second count of rape on the same complainant. The regional court

magistrate imposed a minimum sentence in terms of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 (hereinafter "the Act"). The Act provides a minimum prescribed sentence of life imprisonment when read with paragraph (a) of Part I of Schedule two of the Act. Subject to the provisions of section 51(3)(a), it provides for a minimum obligatory sentence of life imprisonment when the complainant is raped more than once by an accused or co-perpetrator or by more than one person acting with common purpose. The magistrate took the incidents which occurred on the same evening together for the purpose of sentence. On the charge of rape, housebreaking and theft the first appellant was sentenced to life imprisonment and fifteen years imprisonment on the further charge of robbery which was ordered to run separately. The second appellant was sentenced to life imprisonment. Both the appellants appeal against the convictions and sentences handed down.

[2] The appellants were both legally represented before the Court *a quo* and did not testify in mitigation. The first appellant pleaded guilty to the charge of rape and indicated that he broke in but did not steal any items. The second appellant denies having committed the rape or theft. A victim impact assessment report as well as a pre-sentence report pertaining to the appellants were compiled to assist the Court *a quo* in determining an appropriate sentence. The appellants were not first offenders when they

were convicted in the present matter. The first appellant admitted previous convictions of theft in 2000, robbery in 2001 and theft in 2001. The second appellant admitted his previous convictions of trespassing in 2000, theft in June 2003 and December 2003.

[3] In his notice of appeal, the first appellant alleges that the second appellant is not implicated in the crimes. He admitted to the rape and was candid in his plea but denied having stolen the items reported as missing by the complainant. The second appellant contended that the Court *a quo* erred in accepting the complainant's evidence and disregarding his own and denied having participated in the rape. He further stated that the Court *a quo* overemphasised the seriousness of the crime and underemphasised his personal circumstances and that the sentence of life imprisonment was shockingly inappropriate.

[4] In sentencing the appellants, the magistrate approached the sentence on the basis that life imprisonment is the prescribed sentence for rape when the complainant is raped more than once by an accused or co-perpetrator or by more than one person acting with common purpose unless there are substantial and compelling circumstances which indicate that there ought to be a departure from the prescribed minimum sentence. The magistrate took the incidents which occurred on the same evening together for the purpose of sentence and found that there were no substantial and

compelling circumstances which required a departure from the prescribed sentence.

[5] The issues which must be considered in this appeal are whether the conviction with regard to the second appellant is sustained on the evidence beyond reasonable doubt and whether the sentences imposed on the appellants are, in the circumstances of the present matter, disproportionate to the crime and thus shockingly inappropriate.

Background

[6] The complainant resided with her four year old daughter in Gansbaai in the district of Hermanus at the time of the offence. The complainant lived an independent life at the time. She was asleep on the night in question and woke up when she heard a noise in the bathroom. She saw the first appellant climbing through the window, picked her daughter up and tried to flee through the front door. When she opened the door the second appellant was waiting and pushed her back inside the house. The first appellant commanded her to sit against the wall whilst they searched the room. They found her Compact Disc player and cell phone and placed it aside. It subsequently transpired that these items were missing after the incident.

[7] The first appellant then told her to go to the room and to lie on the bed. He

undressed her and penetrated her vaginally. Whilst the appellant had intercourse with her, she held her daughter on her chest. The first appellant then called the second appellant who also penetrated her vaginally. During this time the first appellant searched the room and emptied her handbag. She stood up when the second appellant was no longer on top of her. The second appellant then took out a knife threatened her and told her to lie down as he was not finished. He then penetrated her vaginally for a second time. All this time the complainant held her four year old daughter against her chest for fear that she may come to further harm at the hand of the appellants if she released her. The child cried throughout the ordeal. The appellants then continued searching the house and switched on the microwave causing the electric main switch to trip. Both appellants then fled.

[8] The first appellant is charged with robbing a further complainant of her cell phone at knife point the following day. This complainant ran to a security company and raised an alarm giving the officer a description of the offender. When the first appellant was approached by the officer, he ran away dropping the dismantled parts of the cell phone along the way. A colleague of the officer apprehended the appellant shortly thereafter.

[9] The only dispute concerns the charge of theft and whether the second appellant raped the complainant. The medical report reflects that she had

sustained fresh flesh wounds and blood was present, which is indicative of forceful penetration.

[10] The evidence of the complainant in the rape matter appeared to have been clear in every aspect. It appeared that she had sufficient opportunity to identify the appellants as there was sufficient lighting. The complainant's evidence was clear in this regard. In view of the first appellant's plea and the second appellant's admission that he was on the scene, it is unlikely that the complainant would fabricate a version with regard to the first appellant stealing the goods and the second appellant raping her.

[11] Mr Mahomed who appeared on behalf of the appellants submitted that as the complainant was a single witness, that first appellant denied that the second appellant was involved and that the State, inexplicably had failed to produce DNA and other forensic evidence in respect of the second appellant. He argued therefore that there was insufficient evidence to convict the second appellant of rape. The complainant, however, had no difficulty in identifying both appellants at the ID parade. She justified her identification of both appellants by way of plausible evidence, in particular that she had the opportunity to clearly identify both appellants when they invaded her home on 30 October 2004.

[12] By contrast, second appellant proffered an utterly implausible version that it was one Songezo Mazongola who was the second participant with first appellant. The implausibility was luminously illustrated by the evidence of Mr. Mazongola who testified that the appellants sought to force him to testify. The second appellant informed the court that it was a case of Mr Mozongola being similar in appearance. The observations of the Court *a quo* indicate, however, that the appearance of Mr Mozongola and the second appellant differed in size, build and complexion. The complainant could not have mistaken the second appellant and this witness.

Sentence

[13] In the present matter both the appellants are repeat offenders, having committed previous offences which have a bearing on the sentences in the present matter. The first appellant has previous convictions for housebreaking and theft as well as robbery. The second appellant has previous convictions for theft and trespass offences. The prescribed minimum sentence applies in terms of section 51 (1) Act 105 of 1997. The first appellant pleaded guilty to the charge of rape. The second appellant made certain admissions that he was on the property on the day in question but denies the rape and theft charges.

[14] The Victim Assessment Report indicates that the complainant's life has been detrimentally affected. She has never returned to the address. Her

daughter has suffered tremendously as a result. Understandably due to the trauma of the rape of her mother and the violation of the safety of her home, she has not coped emotionally. This has impacted on other areas of her life, including her schooling. This incident necessitated the complainant having to place her daughter in a boarding facility to ensure that she obtained the necessary psychological support. This is in stark contrast with the complainant's evidence of her life prior to the incident when she lived independently with her young daughter. The social worker's assessment indicates that the complainant has not recovered and does not receive the required psychological support to deal with the trauma of the incident. This impacted on her ability to parent the minor child effectively.

[15] The first appellant is a repeat rape offender. The probation officer's assessment indicates that the first appellant grew up without a male role model and left home at age 15 years old to live with his siblings. The implication appears to be that he received inadequate socialisation. The second appellant appears not to have received the necessary stability according the probation officer. Having regard to the previous offences of both appellants, the appellants show no regard for any opportunities they were given previously to address their offending behaviour. The danger posed by the appellants require the strictest measures to ensure that people can enjoy their rights to security of person.

[16] Mr Mahomed on behalf of the second appellant referred this court to the Convention on the Rights of the Child (1989) and the case of ***S v Blaauw*** **2001 (2) SACR 255** at 264 a-b where reference is made to the Convention. The relevant section reads as follows:

> *"the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."*

[17] Mr Mahomed points out that the second appellant was just more than 17 years old at the time of the commission of the offence and not yet 18 years old. He submits that in light of the second appellant's age and having regard to the aforementioned Convention, and that the complainant did not present with any visible physical injuries, the sentence is disproportionate to the crime. In particular he drew attention to Section 51(3)(b) which provides that when a Court imposes a minimum sentence upon a child who is aged between 16 and 18 at the time of the commission of the offence it shall enter its reasons on the record. As the magistrate overlooked this provision, Mr Mahomed submitted that this court was now at large to determine the sentence.

[18] Section 51(3) (aA) provides:

"(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural and religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed."

[19] The Act provided specifically that the apparent lack of physical injury to complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. The fact that the complainant did not sustain further injuries and was not assaulted or did not experience further violation is not a factor in the present matter that the second appellant can rely on to persuade the Court to depart from the prescribed minimum sentence.

[20] Having regard to the submission that the Court must have regard to the Convention on the Rights of the Child this is not the only international Convention that is applicable. The Convention on the Elimination of Discrimination against Women was also ratified by South Africa. South Africa as a signatory to this Convention is required to take steps to

eliminate all forms of violence against women and children. In terms of the Bill of Rights in the Constitution of the Republic of South Africa, 1996, the complainant has a right to freedom and security of person which includes a right to be free from violence.

[21] Having regard to the above Conventions, the Court is faced with protecting the interests of the appellant, a 17 year old at the time of the offence as well as the interests of the complainant who is the victim of the offence committed by the 17 year old offender.

[22] The article of the Convention on the Rights of Child which Mr Mahomed relies on does not exclude imprisonment. It requires that the imprisonment be meted out in accordance with the law and for the shortest period possible. Having regard to the prescribed minimum sentence provided for in section 51(1)(a) and subject to section 51(3)(a) the Court is also required to consider whether there are substantial and compelling circumstances. In this instance there are none. In this case therefore, it will appear that the minimum sentence is applicable

[23] The submission that the personal circumstances of the appellants were underemphasised is incorrect because the Court *a quo* took account of their personal circumstances and weighed it against the nature of the offences. The Court could find no substantial or compelling circumstances

to justify a departure from the prescribed sentence. The record reflects that the legal representative for the appellants indicated that they could place no substantial and compelling circumstances before the court. A perusal of the probation officer's reports regarding the appellants also did not highlight any substantial and compelling circumstances that would justify a deviation from the prescribed minimum sentence. The appellants impoverished circumstances have to be weighed against the brutality of the nature of the offence. Rape is a violation of a person's integrity, sense of security and deprives the victim of her personal integrity. In this case the facts illustrate that the crime was truly horrific, and was compounded by the brutality experienced by a five year old child. I can find no merit in the appellants' submissions that the sentence imposed is shockingly inappropriate.

[23] I have had regard to four factors influencing sentence, the seriousness of the offence, the purpose of punishment, the personal circumstances of the appellants and the effect of the crime on the victims, being both mother and child, as well as the provisions of Act. The absence of substantial and compelling circumstances is equally important to justify not imposing a lesser sentence.

[24] I have had regard to the submission that the 15 years should run concurrently with the term of life imprisonment. I note the State's

concession that the Court *a quo* erred in this regard. Section 39(2)(a)(i) of the Correctional Services Act 111 of 1998 governs this aspect and provides that a determinate sentence shall run concurrently with a life sentence. In view of this, the 15 years imposed for the robbery with aggravating circumstances should run concurrently with the life sentence which the first appellant must serve.

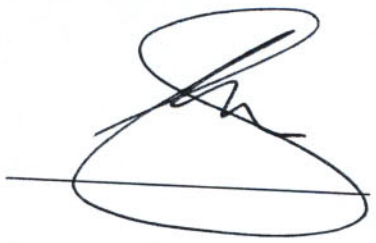
Order

[25] For the reasons given above,

1) The appeal against the conviction of the first appellant is dismissed.

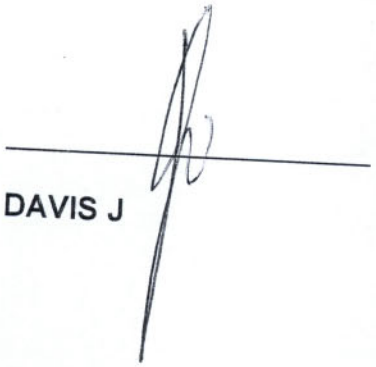
2) The sentence of the first appellant is amended so that the 15 years imprisonment is ordered to run concurrently with the sentence of life imprisonment.

3) The appeal against the convictions and sentence in relation to the second appellant is dismissed.



MIA AJ

I agree and it is so ordered.



DAVIS J