IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A03/2010

DATE: 5 AUGUST 2011

In the matter between:

RODERICK KLINK 1st Appellant

MARTIN FRIESLAAR 2nd Appellant

and

THE STATE Respondent

J U D G M E N T

DOLAMO, AJ:

The two appellants were convicted in the Regional Court, Ladismith, on 7 November 2008, on one count of rape and each sentenced, on 11 March 2009, to 15 years imprisonment in terms of the minimum sentencing legislation and in terms of section 103(1) of Act 60 of 2000, declared unfit to lawfully possess firearms. The charge sheet alleged that the appellants were guilty of the crime of rape, read with the provisions of sections 51(1), 51(2), 52(2), 52(a) and 52(b) of the Criminal Law Amendment Act 105 of 1997, in that between

10 and 11 October 2007 and at or near Protea Park, Zoar, Ladismith, they wrongfully and intentionally had sexual intercourse with the complainant, a female who was 37 years old at the time, without her consent.

They were initially also charged with one count of assault with the intent to do grievous bodily harm, allegedly committed against the same complainant, but it will appear that only the rape charge was eventually put to them. Their convictions followed on their pleas of guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977. Their respective written statements, in explanation of their pleas of guilty, were essentially identical in the narration of the circumstances that led to the commission of the offence and how it was committed.

The appellants stated that on the night in question, had been drinking together at a house which is diagonally opposite to that of the complainant. That they ran out of money, I assume that is money to purchase alcohol drinks, and decided to go to the complainant to ask her for some. As they got nearer to her house, they noticed that it was open and that she stood there only clad in her panties. On the spur of the moment, first appellant decided to ask her for sex. She refused, whereupon they pinned her down on her bed and took turns raping her.

The rape took the form of penetrating her vagina. Both admitted that though they had been drinking, they were still in their full and positive senses and knew that what they were doing was unlawful. The state accepted this plea of guilty in the terms in which they were set out in their respective statements in terms of section 112.

After being sentenced as aforesaid, appellants applied for leave to appeal against their sentences. These applications were dismissed, whereupon first appellant petitioned this court for leave to appeal, and same was granted to both appellants. In the case of the first appellant, the sentence imposed by the court *a quo* is attacked on the following basis: Firstly that the learned magistrate misdirected himself by overemphasising the interest of society. Secondly, that the learned magistrate, in the light of the circumstances of the case and the mitigating factors, misdirected himself in imposing a sentence of imprisonment for 15 years. Thirdly, that the sentence imposed was excessive and induced a sense of shock. Lastly, that it conveys the impression that only punishment and not the other purposes of sentencing such as rehabilitation, was intended with this sentence.

The second appellant challenged the sentence on the basis that he was prejudiced by the misdirection committed by the

learned magistrate in applying the sentencing legislation in its amended form, which amendments only came into operation on 31 December 2007, which was contrary to the provisions of section 35(1) of the Constitution and also that the magistrate took into consideration factors which were never part of the evidence or facts which were accepted by the state. Finally, that his personal circumstances were not taken into consideration.

To sum up, the sentences imposed were basically attacked on the grounds that they were vitiated by a material misdirection by the magistrate in that they were shockingly inappropriate as to warrant an interference by this court. At the outset it is pointed out that it is common cause that the learned magistrate's misdirection lies in the fact that he incorrectly applied the provisions of Act 32 of 2007, which came into operation on 31 December 2007 to the offence which was committed prior to that date.

While the state conceded in its head of argument that the learned magistrate misdirected himself by incorrectly applying the amended legislation, submitted that the sentences imposed were, notwithstanding this misdirection, appropriate. It was, however, conceded today in argument that the sentences were shockingly inappropriate. This court is also of the view that

the misdirection by the learned magistrate led, inadvertently, to the imposition of a shockingly disproportionate sentence, one which this court can interfere with.

I proceed, therefore, to assess what will be an appropriate sentence. In doing so, the time honoured purposes of sentence becomes paramount. In S v Chapman 1997 (2) SACR 3 (SCA) at page 5, the then Mohamed CJ described rape as "a very serious offence, constituting, as it does, a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim", and as "violating the right to dignity, privacy and the integrity of its victim". These victims are mainly women. The learned chief justice went on to state that the courts are under a duty to send a clear message to the accused, to other potential rapists and to the community, that it was determined to protect these victims' rights.

These sentiments were echoed in many subsequent judgments, with the seriousness of the offence always being accentuated and no distinction being drawn between the more severe forms of the offence and the less repulsive ones. The prevalence of the offence, coupled with the unsuccessful prosecution in some instances, exacerbated the problem. These problems led to the court in S v Vilakazi 2009 (1) SACR 552 at 556 paragraph [3] to remark that:

"There are considerable risk in those circumstances that excessive punishment will be heaped on the relatively few who are convicted in retribution for the crimes of those who escape, or in the despairing hope that it will arrest the scourge.

We are, therefore, to constantly remind ourselves, as the Constitutional Court did in S v Dodo 2001(1) SACR 594 (CC) at paragraph [38] that punishment must always be proportionate to the offender."

The courts, however, gradually came to identify that, though rape remains a serious offence, not all rapes are of the worst kind. In S v Mahamotsa 2002 (2) SACR 435 at 443, paragraph [17] Mpati JA, as he then was, acknowledged that the rapes the court was concerned with in that matter, though very serious, could not be classified as falling within the worst category of rapes and consequently found that there were substantial and compelling circumstances to depart from the mandatory sentence of life imprisonment, but nevertheless deemed it necessary to increase the sentence to eight and 12 years imprisonment respectively.

I am of the view that the rape *in casu*, similarly, is not one falling within the worst category. On the facts which were

accepted by the state prosecutor, the offence was committed on the spur of the moment. As the victim impact report, which was called for but was not available to the court at the time when the appellants were sentenced, I cannot as such remark on the submissions made by the appellants' legal representative in the court *a quo* that the complainant was not seriously traumatised, nor did she, according to the medical report, suffer any physical injuries. The failure to comment on this submission, however, shall not in any way be construed as a countenance by this court of the often erroneous submissions that certain victims of this crime are less affected by the callous invasion of their bodily integrity and privacy.

It was furthermore accepted, in the court *a quo*, that no violence or dangerous weapons were used to subdue the complainant. Other factors which were presented in mitigation of sentence were: that the appellants were under the influence of intoxicating liquor at the time. Though there is no indication on the record as to the amount of liquor the appellants consumed on the night in question, they, themselves, admitted that such consumption did not affect their abilities to distinguish between right and wrong. It is, however, accepted by this Court that it affected their ability to act accordingly and that the appellants were as such influenced by the alcohol intake. It was also accepted in the court *a* quo and I accept

that too that the appellants' plea of guilty was a sign of remorse.

Turning to the appellants themselves. First appellant was 18 years at the time of the commission of the offence. Second appellant was 17 years old, still a child as defined in section 28(3) of the Constitution of the Republic of South Africa. Such a child, according to section 28(1)(g) has a right "not to be detained except as a measure of last resort", in which case, in addition to the rights the child enjoyed under section 12 and 35, "... to be detained only for the shortest appropriate period of time..." The first appellant, although not falling within this definition of a child, was nevertheless not a fully developed adult.

Our constitution recognises that children have to be treated differently when it comes to punishment. The rationale for the differentiation is that not only are they less physically and psychologically matured than others, they are more vulnerable to influence and pressure from others and most vitally they are generally more capable of rehabilitation than others. Further aspects that need consideration are that both appellants come from disfunctional family backgrounds, where violence and the misuse of alcohol was the norm. Both did no go far in education. They were both thrusted into the adult world when

they had to find employment at an early age because of their financial circumstances. Both are not first offenders, having already had a brush with the law. First appellant was convicted of rape and was serving a five year imprisonment term at the time. This offence was committed while he was still 17 years old. Second appellant on the other hand was convicted of indecent assault and serving five years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act.

These circumstances are such that the sentence that was imposed by the learned magistrate can now be placed in its proper perspective, and once that is done, it is apparent that it was inappropriate and excessive in the circumstances. I therefore have come to the conclusion that this court must interfere with that sentence.

But before I propose the order that this court may make, as my brother here inquired from the state and the defence, I need to deal briefly, as circumstances would permit, with the disturbingly slow pace, brought about by the unwarranted postponements, at which the case was brought to a close. According to the charge sheet, the appellants were arrested on 11 October 2007, that is the day on which, according to the charge sheet, had committed the offence. They made their first

appearance on 30 April 2008, i.e. in the Regional Court. There is no indication on the record of what happened from the date of arrest to the date of their first appearance in the Regional Court. From thereon the matter was remanded to 22 and 23 July 2008 for trial. This was apparently by agreement between the state and the defence. On 22 July 2008, a legal representative was granted leave to withdraw as the attorney of record for the second appellant due to lack of financial instructions. The matter was then adjourned to 23 July 2008 for second appellant to make an application to the Legal Aid Board for assistance. Instead of a legal representative from the Legal Aid Clinic appearing for the second appellant, the same legal representative who withdrew a day before, appeared and requested that the matter be postponed to 21 August 2008, which on a cursory inquiry by the presiding officer, was granted. On 21 August 2008, when all the state witnesses were available, the matter was again postponed to 7 November 2008 due to an alleged conflict of interests. On 7 November 2008 another attorney appeared for second appellant. The appellants pleaded guilty and, as already stated supra, gave almost identical statements in explanation of their pleas.

The matter was thereafter postponed to 5 December 2008 for a probation officer's report and the impact report on the

complainant. The matter was again postponed to 3 February, to 4 February, to 20 February, to 26 February and eventually to 27 February 2009 when the probation officer's reports were made available. On 27 February 2009, another attorney from the Legal Aid Clinic appeared for second appellant and requested a postponement to enable him to prepare and address the court in mitigation, which request appeared to be noble at the time, was granted. Surprisingly this attorney did not appear on 17 March 2009 and the initial attorney, who was appointed by the Legal Aid Clinic, reappeared for second appellant. That is the day on which the appellants were sentenced.

The end result is that the appellants spent a period of approximately 18 months awaiting trial, hardly the hallmark of a speedy trial to which the appellants were entitled in terms of section 35(3)(b) of the Constitution. A firmer grip on the proceedings was required and it will in future be required, from all the role players, so as to avoid the prejudice which the appellants suffered. It will further be in the interests of justice that trials be disposed of as speedily as possible.

Having regard to the nature of the crime, the circumstances of the appellants, particularly their youthfulness, I am of the view that the interests of society will be served if a sentence of 10

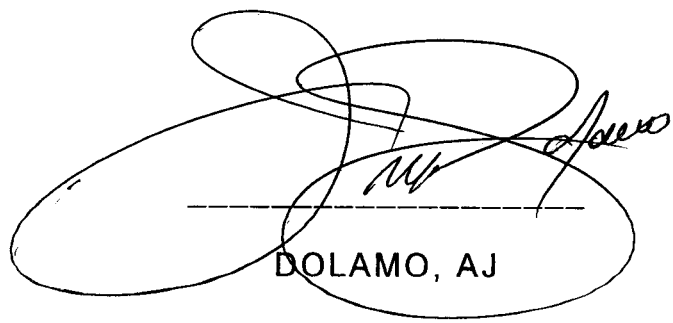
years imprisonment, four years of which is suspended, is imposed. The order I propose is, therefore, the following:

1. The appeal against sentence succeeds.

2. The sentence of 18 years imposed on first and second appellants by the Regional Court is set aside and substituted by a sentence of **10 (TEN) YEARS IMPRISONMENT, OF WHICH FOUR (4) YEARS IS SUSPENDED FOR FIVE (5) YEARS ON CONDITION THAT THE APPELLANS ARE NOT FOUD GUILTY OF RAPE OR ATTEMPTED RAPE COMMITTED DURING THE PERIOD OF SUSPENSION**.

3. In terms of section 103(1) of Act 60 of 2000, the appellants are declared unfit to lawfully possess firearms.

4. The appellants' legal representative are urged to get in contact with the prison authorities to ensure or find out as to when the appellants can be placed on parole.



DOLAMO, AJ

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ERASMUS, J: I agree. The order as proposed is made and Mr Burgers, clearly in the light of the time spent in prison already, I wish you to ensure, with the assistance of the registrar, that the orders be sent through to the prison and your clients made aware of the possible release on parole.

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ERASMUS, J