Republic of South Africa

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

Coram: LOUW, LE GRANGE et FORTUIN, JJ

Case No: A193/10

In the matter between:

GERT WATERBOER

Appellant

And

THE STATE

Respondent

JUDGMENT: 18 FEBRUARY 2011

LE GRANGE, J:-

[1] The Appellant was convicted of one count of rape involving the infliction of grievous bodily harm and two counts of assault with intent to do grievous bodily harm in the Regional Court, sitting at Vredendal. The Regional Magistrate, after the convictions, applied the provisions of section 52(1) of the Criminal Law Amendment Act 105 of 1997, and referred the matter to the High Court for sentence.

[2] In considering an appropriate sentence, the Court *a quo* found no substantial and compelling circumstances in favour of the Appellant justifying the imposition of a lesser sentence in respect of the rape conviction. The rape and assault counts in respect of the first complainant were taken together for the purpose of sentence and life imprisonment was imposed. The Appellant, for the second assault charge, was sentenced to 5 years' imprisonment which was ordered to run concurrently with the sentence of life imprisonment.

[3] The Appellant, with leave of the Court *a quo*, now appeals only against his sentence.

[4] The grounds of appeal against sentence are firstly, the minimum sentence regime is not applicable as the Appellant was not properly warned by the trial Court about the applicability of the minimum sentence and the consequences thereof. Secondly, the Court *a quo* misdirected itself by finding that there are no compelling and substantial circumstances justifying the imposition of a lesser sentence than the prescribed one.

[5] It is now well accepted that the Minimum Sentences Act, No 105 of 1997 as amended, has brought about a different approach to the consideration and evaluation pertaining to sentence. Courts are compelled by section 51 (1) and (2) of the abovementioned Act, to impose certain minimum sentences for specified crimes. A lesser sentence may only be imposed if a

Court is satisfied that substantial and compelling circumstances exist justifying a departure.

[6] The facts underpinning the convictions briefly stated, are the following: The complainant, Katriena Swartz, on the day of the incident, visited her boyfriend Jan Zimmerie and her sister on a neigbouring farm. It is not in dispute that she consumed a certain amount of alcohol during her visit. Later the day she decided to return home. Whilst walking to the farm where she resides, the Appellant, whom she knew, came from behind and suddenly grabbed and pushed her into the vineyards. She screamed and struggled to fight back but despite her efforts, the Appellant managed to undress and rape her. He also stabbed her with a knife on her forehead and in the abdomen.

[7] The complainant's boyfriend (Zimmerie) who came on the scene to assist her was also attacked. The Appellant stabbed him in the head with the knife. He also sustained facial injuries as a result of the fight between him and the Appellant.

[8] The stab wound in the abdomen of Swartz was serious and, it would seem, potentially life threatening. According to the medical report (J 88), the doctor suspected that the knife wound had penetrated her intestines. She was hospitalised for approximately a week and according to the complainant, she underwent an operation. This report also reveals that Swartz is small of stature and weighed only 28 kg.

[9] The Appellant testified in mitigation of sentence. He was 30 years old at the time of sentence and a farm worker. He attended school up to standard 5. He was living with his common law wife and has two minor children aged 7 years and 6 months old.

[10] The State tendered evidence of a social worker on sentence. The complainant informed her that as a result of the incident, she was afraid to walk alone at night. She knew the Appellant very well and she was very helpful to him when he arrived on the farm for the first time. The Appellant could have killed her and for that she resented him. The incidents had a severe negative impact on her subsisting love relationship. The fact that the perpetrator was a person known to her made matters worse.

[11] The Appellant is not a first offender. He has two previous convictions. In June 1990, he was convicted of assault and he was sentenced to 6 months' imprisonment. The sentence was suspended for a period of 5 years on condition that he was not convicted of assault, assault with intent to do grievous bodily harm, robbery or attempted robbery during the period of suspension and in respect of which he is sentenced to imprisonment without the option of a fine. A year after this conviction, in June 1991, he was convicted of rape for which he was sentenced to 10 years' direct imprisonment. He was released in January 1999 but was back in prison in June 1999 due to a violation of his parole conditions. He was released in January 2000 and only 9 months later, in October of the same year, he

committed the present crimes. In addition, in November 2001, he was sentenced to 30 months imprisonment on charges of house breaking and theft which were committed either before the present offences or while on bail awaiting trial.

[12] Returning to the grounds of appeal. The contention that the trial Court failed to properly inform the Appellant about the rape offence that falls under the new minimum sentence regime, needs closer scrutiny. On 27 January 2003, before the proceedings were mechanically recorded, the following was hand recorded by the trial Court, *"Beskuldigde verskyn. Hy stel nie belang in regshulp nie. Wil sy eie verweer behartig. Hy is meegedeel van die moontlikheid na verpligte vonnisse maar hy volhard dat hy self sy verweer wil behartig".* When the proceedings were mechanically recorded and immediately after the Appellant pleaded to the charges proffered against him, the trial Court again warned him of the minimum sentences. The following is recorded at page 12 of the record: "*Mnr. Waterboer, ons het nou al hieroor gepraat. Jy sê hy wil self jou saak behartig. Ek het jou ingelig van die verpligte vonnisse ensovoorts. Dis jou besluit nê? - - - Ja, Edelagbare."*

[13] The trial Court at page 26 of the record and after the first complainant testified recorded the following:-

> *"Hof: Soos ek vir jou vroeër gesê het hier is 'n moontlikheid van verpligte vonnisse, as jy skuldig bevind word, lewenslange gevangenisstraf. Seker jy wil nie 'n prokureur aanstel nie?*

Beskuldigde: Nee Edelagbare".

[14] The Appellant, after the first complainant's evidence in chief, wisely decided to apply for legal assistance. A legal representative thereafter appeared on his behalf. It is evident from the warnings on record that the Appellant was made aware of the provisions of the Criminal Law Amendment Act and its applicability. The record also demonstrates the Appellant understood his rights in this regard. There is no indication on the record that the Appellant did not comprehend the implications that he may face the ultimate penalty if a conviction follows. It follows that the contention that the Appellant's trial was substantially unfair and resulted in prejudice as he was not properly informed of the minimum sentence regime, is without merit and can safely be rejected.

[15] In respect if the second ground of appeal, Mr. Burger argued that on a careful consideration, the sentence of life imprisonment is disproportionate taking into account the Appellant's personal circumstance, the seriousness of the offences and the interest of society and is a lesser sentence justified. Moreover, the rape the Appellant was convicted of may be serious in nature but not to the extent that it calls for the ultimate penalty.

[16] In S v Abrahams 2002 (1) SACR 116 SCA, at 127 (d) Cameron, JA (as he then was) held that:-

"... some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust. As Davis, J stated in S v Swartz and Another:-

> *'As controversial a proposition as this is bound to be, as not all murders carry the same moral blameworthiness, so, too, not all rapes deserve equal punishment. That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness.'"*

[17] This may be so, but rape is still a serious problem in our society. In De Beer v S (121/04) dated 12 November 2004 an unreported judgment of the SCA para 18, the following was held:-

> *"Rape is a topic that abounds with myths and misconceptions. It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself."*

[18] Ponnan, JA in State v Matyityi (695/09) [2010] ZASCA 127 (30 September 2011) repeated the sentiments as expressed in the De Beer case. Ponnan, JA also re-emphasised the approach Courts should adopt when the minimum sentence regime is applicable, at para 23 the following was held:-

"Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is "no longer business as usual". And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentence prescribed by the legislature for the flimsiest of reasons – reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons fro departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

[19] It is against this sober approach that the second ground of the appeal should be considered. There is no suggestion that the personal circumstances of the Appellant were not properly considered. The main issue is whether the rape falls in one of those "worse categories" as mentioned in the Abrahams case, and whether the cumulative circumstances of the Appellant amounts to substantial and compelling circumstances rendering the minimum sentence disproportionate and unjust.

[20] On a conspectus of the evidence in this case, it is evident that the Appellant has a flagrant disregard for human dignity and physical integrity. He not only raped the first complainant, but used violent force against her and the second complainant. An element of violence is also a common thread running through his previous convictions. The Appellant has a previous conviction for rape. Despite serving almost the full term of his ten years' imprisonment for that offence, the Appellant committed the same offence within months after being released from jail. This fact, coupled with the Appellant's complete lack of remorse and acceptance of the enormity of what he had done, strongly suggests that the Appellant is a danger to society. Moreover, what compounds the seriousness of this rape is that despite the physical trauma of the rape itself, the Appellant viciously stabbed the first complainant in her abdomen when an attempt was made to ward him off. The stab wound caused her to be hospitalised as she sustained internal injuries. A more serious and inhumane attack on a person that barely weighs 30 kg, as in this instance, is difficult to imagine. The contention therefore that this is not "rape of the most serious kind" is, in my view, untenable and can safely be rejected.

[21] Mr. Burger also alluded to the consumption of alcohol and drugs by the Appellant as a mitigating factor. During his testimony in mitigation of sentence, the Appellant stated that he was drunk on the day in question. There is however no evidence on record as to the quantity of liquor that he consumed or his degree of intoxication. Little weight can therefore be

attached to the Appellant's level of intoxication and it deserves no serious consideration as a mitigating factor.

[22] The Court *a quo* was alive to the Malgas judgment and properly considered the Appellant's personal circumstances against the seriousness of the offence and the interest of society. In my view, taking into account the cumulative circumstances of the Appellant, there are no true convincing reasons justifying a departure from the prescribed sentence on the rape conviction. The ultimate sentence is also not manifestly unfair or disproportionate in the circumstances of this case if due consideration is given to the mitigating and aggravating factors. According to me, this is precisely the type of matter the legislature had in mind when it enacted the minimum sentence regime.

[23] It follows that the appeal against the sentence cannot succeed.

[24] In the result I would propose the following order:-

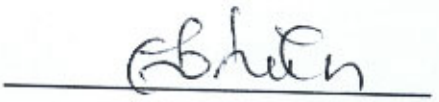
The appeal against sentence is dismissed.

LE GRANGE, J

I agree and it is so ordered.

LOUW, J

I agree.



FORTUIN, J