REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO. A124/09

In the matter between:

M GALLIE Appellant

and

THE STATE Respondent

JUDGMENT

1] On 4 November 2008 the Appellant, who appeared with three co-accused, was convicted and on 25 November 2008 he was sentenced as follows on the following charges in the Somerset West Regional Court:

1.1] Robbery with aggravating circumstances, 15 years imprisonment;

1.2] Kidnapping , 5 years imprisonment;

The sentences in 1.1 and 1.2 were ordered to run concurrently.

1.3] Rape on Ms Arries, a 14 year old girl, life imprisonment;

1.4] Rape of Ms Davids, an adult, 10 years imprisonment;

1.5] Indecent assault of Ms Davids, 8 years imprisonment;

The sentences in 1.4 and 1.5 were ordered to run concurrently.

1.6] Attempted murder, 8 years imprisonment.

(In terms of the provisions of the Correctional Services Act, Act 111/1998 Sec 39 (2)(a)(i), all the sentences imposed will run concurrently with the life sentence in respect of the rape of the young girl.)

2] The trial in this matter was postponed and delayed an inordinate number of times, frequently at the insistence of the Appellant, for various reasons, including substitution of representatives and protestations of mental anguish.

3] On 26 August 2004 the charges were put to the Appellant. Initially he said that he was not ready to plead and a plea of not guilty was recorded in relation to certain charges, while in respect of some charges he pleaded guilty.

4] Appellant was charged, *inter alia,* with the common law offence of rape, read with the provisions of sections 51 and 52 of Act 105 of 1997, in that he had sexual intercourse with a 14 year old female without her consent. He stated that he understood the charge and pleaded guilty to this offence, charge no 6. After some postponements, the matter proceeded on 26 January 2005. On that day his legal representative and Appellant confirmed, more than once, that Appellant pleaded guilty to this charge of rape. Appellant was not prepared to explain his plea of not guilty on some of the other charges.

5] In respect of certain charges, including charge 6, the rape charge relating to the 14 year old female, Appellant prepared a statement in terms of the provisions of section 112(2) of the Criminal Procedure Act, 51 of 1977, which was read out and filed as exhibit '**B**'. In particular Appellant admitted that he had sexual intercourse with the 14 year old without her consent, after she had pleaded with him. The State noted that the pleas of guilty were not accepted. The pleas were accordingly changed to not-guilty and the matter postponed to 16 March 2005.

6] After further postponements, since no evidence had been led, the trial eventually proceeded before another Magistrate on 8 May 2007. It was recorded that Appellant had been referred to Valkenberg for observation and that it had been found that he was not mentally ill and was fit to stand trial. At this stage the Appellant again terminated the mandate of his latest representative and elected to represent himself despite the Magistrate's recommendations that he should rather be represented in circumstances where he was facing lifelong imprisonment. It is apparent from the record that Appellant was smiling when the Magistrate commented on the frequent postponements of the matter and she was compelled to berate him for not listening to her at one stage. The trial eventually proceeded on 7 June 2007.

7] After he had been convicted and sentenced, as stated hereinabove, the Appellant filed documentation relating to condonation and a Notice of Appeal against sentence only, dated 31 December 2008. According to the record the matter came before the presiding Magistrate on 6 February 2009. She noted that she had made an error in relation to automatic review of the judgment and informed the Appellant that he had an automatic right of appeal. Although it is not quite clear from her

comments on the record, she noted that papers had already been prepared and that Appellant could proceed with the Appeal. I conclude that the Appellant was granted leave to appeal against the sentence only.

BACKGROUND CIRCUMSTANCES

8] On 13 July 2002 the Appellant and others went to Macassar Beach after frequenting a shebeen. They enquired about a cigarette from the four complainants, Messrs September ('September') and Laubscher and Ms Arries and Ms Davids. Then the Appellant pointed a firearm at the head of September. Three of Appellant's accomplices threatened the complainants with knives as a result of which they submitted to the taking of their property. Each handed over some personal items, including clothing and jewelery.

9] The complainants were forced into September's car who was instructed at gunpoint by Appellant, who appeared to be the driving force in the attack, to drive to a spot near Macassar Beach. September's cell phone and bank card were found in the car and Appellant, brandishing his firearm, demanded September's pin number threatening him with his life, should it turn out that he had provided incorrect information.

10] Appellant took Ms Arries around a corner and, according to her, despite her pleas, anally penetrated her and forced her to put his penis in her mouth. He did not use a condom. Thereafter Appellant and an accomplice left to withdraw money from September's bank account while the other accomplices watched the victims. Appellant returned, having purchased drugs and alcohol with the money withdrawn from September's account. He took Ms Davids to a spot nearby, where he

indecently assaulted her by penetrating her anally, before raping her. In terms of current legislation the said indecent assault would have qualified as a second rape.

11] Shortly thereafter the Appellant and one of his accomplices placed a belt around September's neck and started throttling him until he became unconscious. Appellant instructed his accomplice to stab September in the heart, which the accomplice refused to do, thinking that September was already dead. The Appellant took the knife from his accomplice and proceeded to undress September, whereafter the accomplice left with some clothes of September. Appellant was about to stab September in the heart when he regained consciousness and a scuffle ensued. The Appellant called his accomplices and they also proceeded to assault September, who very unfortunately for him managed to escape and to obtain assistance. The police were called.

12] The remaining three victims were left behind as Appellant and his accomplices drove away in September's car, after his escape.

CONVICTION ON CHARGE OF RAPE OF 14 YEAR OLD GIRL.

13] Although the Appeal was directed at sentence only, the counsel for the defence and the State pointed out during argument in the appeal that the Magistrate had erred in finding the Appellant guilty of the Rape of the 14 year old girl, in circumstances where her own evidence was that she had only been anally penetrated by the Appellant. (She had been raped by another accused.) It is regrettable that this aspect was not clarified at the hearing in the lower court. In Ms Arries' statement to the Police it was recorded that there had been vaginal

penetration by the Appellant. She was only examined with relation to vaginal penetration and injuries to her vagina only were noted.

14] I am not convinced that she was in fact not vaginally penetrated by the Appellant and he never denied that he raped her. He also did not deny her version of anal penetration. However, in view of the evidence presented I do not think the State has proved, beyond reasonable doubt, the elements of common law rape, as these elements existed in 2002, the offence that Appellant was charged with and to which he pleaded. I believe that the conviction in respect the charge of rape of the 14 year old was not in accordance with justice and that the Appellant was prejudiced by a wrong conviction on this charge. Accordingly, I set this conviction aside and replace it with the conviction of indecent assault, which would have been a competent verdict for the Magistrate to make on this charge. I thank Mr September, acting on behalf of the State, for his concessions and able argument in relation to this aspect.

SENTENCE

15] At the time of sentence the Appellant stated that he was 36 years old, (which means that he was about 29 years old at the date of the offences) that he was an unmarried father of three and had been employed in the fishing industry. He had a previous conviction for armed robbery, (for which he was sentenced to 5 years imprisonment in terms of Section 276(1)(i). Three and a half years imprisonment was suspended for five years on certain conditions).

16] The Appellant submitted in his Notice of Appeal that the Magistrate erred in various ways, *inter alia by* not fully taking into consideration: that the Appellant pleaded guilty thereby saving the State a considerable amount of time and money,

the fact that the Appellant showed considerable remorse for his actions, the time the Appellant had been incarcerated while awaiting trial, that he could rehabilitate in a shorter period than the period of the sentence imposed and he submitted that the sentence induced a sense of shock and did not show mercy. Appellant's counsel argued that the sentence placed undue emphasis on public opinion and the element of retribution, did not take sufficient notice of Appellant's personal circumstances and that by over-emphasising the seriousness of the offence, the magistrate imposed a sentence that was shockingly inappropriate.

17] It is trite that a court of appeal will not interfere with the sentence arrived at by a court *a quo,* in the exercise of its discretionary powers, merely because the higher court would have exercised the discretion differently. The appeal court will only interfere when the sentence of the lower court is vitiated by irregularity or misdirection or is disturbingly inappropriate, in effect where it can be concluded that the presiding officer exercised his/her discretion improperly or unreasonably. One of the ways to show that a trial court did not exercise a discretion properly is when it can be shown that there was a misdirection in the court's reasons for sentence. The principle in this regard was expressed by Trollip, JA in S v Pillay 1977 (4) SA 531 at 535 E-F, namely that the word 'misdirection' in this context means an error committed by the court in determining or applying the facts for assessing the appropriate sentence.

18] The seminal judgment on how courts should deal with relevant facts in order to consider and decide whether there are substantial and compelling circumstances justifying a departure from a minimum sentence, were set out in great detail in S v Malgas, 2001 (1) SACR 469 (SCA). The gist of this judgment is that specified

sentences should not be departed from lightly or for flimsy reasons which could not withstand scrutiny. However, if the circumstances of the case call for a different sentence based on truly convincing reasons, the court should not hesitate to impose such different sentence. It is expected of the court to weigh all considerations traditionally relevant to sentencing.

19] See also *S v PB* 2011 (1) SACR 448 SCA and a case referred to therein, S v Matyitiyi, 2011 SACR 40 (SCA), relating to the approach adopted by our courts in applying minimum sentence legislation.

20] It is trite that the personal circumstances of the appellant cannot be viewed in isolation. They have to be weighed against the aggravating circumstances of the offence. In this matter the conduct of the appellant was sufficiently reprehensible to fall in a category of offences calling for a sentence reflecting the court's strong disaproval, hopefully resulting in a deterrent to others from committing such cold-blooded crimes.

21] The magistrate took into account the personal circumstances of the Appellant, the nature and seriousness of the offence and the interests of society. The offences for which the Appellant was convicted and sentenced are not only extremely serious, but alarmingly prevalent throughout the country. The Magistrate had due regard to the circumstances of the matter including the violence of the offences, the fact that the one victim was only 14 years old at the time of her rape/assault and that the victims all suffered considerable psychological and physical trauma. The Magistrate further considered that the trial had been protracted by the conduct of the Appellant which resulted in his long incarceration and it is incorrect that he pleaded guilty to all

charges. In fact, at one stage he denied that he had been on the scene of the crimes.

22] The Magistrate correctly considered the cumulative effect of the sentences and showed mercy by ordering that the sentences in relation to kidnapping and armed robbery and those in relation to the indecent assault and rape of Ms Davids, would run concurrently.

23] In these circumstances and having regard to the overall conduct of the Appellant, the Magistrate did not overlook any aspect to consider in relation to sentence, did not commit any misdirection and correctly found that no substantial and compelling circumstances existed which would justify the imposition of a lesser sentence than the prescibed minimum sentence in respect of the rape charge and the charge of robbery. In view of the seriousness of these offences and the reprehensible, brutal conduct of Appellant on vulnerable people who in no way incited this attack on them, it cannot be said that the sentences were shockingly inappropriate.

24] With regard to the conviction of indecent assault, as opposed to the conviction of Rape, in respect of the 14 year old, it was argued on behalf of Appellant that a markedly lesser sentence would be appropriate in the circumstances. The State referred us to Masiya v Director of Public Prosecutions, Pretoria and another (Centre for applied legal studies and another, Amici Curiae) 2007(2) SACR 435 CC. In this matter it was found that the common law definition of rape, as it existed at the times when these crimes were committed and when the accused pleaded, should be extended so that the definition of rape would include acts of non-consensual intentional anal penetration. The court commented that non-consensual anal

penetration of women and young girls constitutes a form of violence against them equal in intensity and impact to non–consensual vaginal penetration and that extending the definition of rape to include penetration of a female's anus would protect the dignity of survivors and increase the extent to which a vulnerable and disadvantaged group in society, namely women and children would be protected by the law.

25] The court also held that if the definition of rape were to be extended retrospectively, it would offend the principles of legality. Fairness to the accused required that an accused should not be convicted of an offence in circumstances where the conduct in question did not constitute such an offence at the time of its commission. The court accordingly found that the conviction of the accused of rape in circumstances of anal penetration would be in violation of his rights in terms of the Constitution. In that matter the conviction of the Appellant of rape was set aside and replaced with a conviction of indecent assault and the case was remitted to the magistrates' court for sentencing.

26] I believe it is not in the interests of justice to remit the matter to the Regional Court for sentence. All aspects relating to and to be considered in respect of sentence are before us. The Appellant showed this young victim no mercy despite her pleas. He did not use a condom, thereby subjecting her to the risk of HIV infection. From the J88 filed in this matter it appears that she was still a virgin, her innocence blatantly ripped away by the Appellant. Fortunately she was not too severely physically injured, but doubtless her emotional scars will last a lifetime. Ultimately I believe an appropriate sentence for the offence of indecent assault on the 14 year old, in the circumstances, will be 20 years imprisonment. Any lesser

indecent assault be one of 20 years imprisonment to be effective from the date of sentence in this matter in the Regional Court, namely 25 November 2008.

28] As regards Appellant's appeal against the sentences imposed in regard to the other charges, namely rape, indecent assault, robbery with aggravating circumstances, kidnapping and attempted murder, the appeal is dismissed and the sentences imposed are confirmed, save that it is ordered, in addition, that the sentence of 20 years in respect of the indecent assault of Ms Arries will run concurrently with the sentences of 10 years and 8 years in respect of the rape and indecent assault of Ms Davids and the sentence of 15 years and 5 years in respect of the robbery and kidnapping. For the sake of clarity it is recorded that the total effective sentence will therefore be 33 years imprisonment.

E.T. STEYN

GANGEN, AJ:

I agree.

N. GANGEN