[REPORTABLE]

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

Case No. A75/2012

In the appeal between

EBRAHIM TOFIE Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED 15 JUNE 2012

GANGEN, A J:

Introduction

[1] On 1 February 2011 Appellant was convicted in the Regional Court, Wynberg on two counts of Rape of a 15 year old female person.

[2] On 25 March 2011 Appellant was sentenced to ten (10) years imprisonment on each count. The court ordered that the sentences

were not to run concurrently and thus imposed an effective sentence of 20 years imprisonment.

[3] Appellant was legally represented and pleaded not guilty to both charges.

[4] On 19 April 2011 appellant was granted leave to appeal against both convictions and sentences.

Circumstances of the offence

[5] It is common cause that on 8 January 2010 the complainant and her friend, Dean Lewis, were walking in Parkwood. The Appellant joined the complainant and her friend. At the request of the complainant, Dean Lewis left. The complainant had decided not to sleep at her residence. The complainant requested the appellant to accompany her to relatives living in the area. Appellant was known to the complainant as the complainant and the appellant's son were friends. The Appellant also knew the complainant's parents. On the way, Appellant and the complainant stopped at a field in Parkwood. Shortly thereafter, the complainant ran from the appellant and raised an alarm that she was raped. In response, Mr Walied Ismail came out of his house. Mr Ismail saw Appellant near the complainant and saw the appellant fastening his pants. The complainant informed Mr Ismail that she was raped.

Appeal against Conviction

[6] The grounds for the appeal against conviction are that the magistrate erred in finding that the State had proved its case beyond a reasonable doubt and in finding the evidence of the complainant to be honest and reliable.

[7] It is trite that a court will be very reluctant to upset the findings of a trial court unless the appellant satisfies the appeal court that there has been some miscarriage or violation of some principle of law and procedure. These principles laid down in *R v Dhlumayo and Another* 1948 (2) SA 677 (A) and affirmed in *S v Hadebe* 1997 (2) SACR 641 (SCA) by Marais JA who stated

> "...there are well established principles governing the hearing of appeals against finding of fact. In short in the absence of demonstrable and material misdirection by the trial court, its finding of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by the appellate courts to factual findings of the trial court are so well known that restatement is unnecessary."

[8] The magistrate in her considered judgment accurately summarised the evidence. It is therefore unnecessary to set out the evidence in detail. The state's case consisted of the evidence of the complainant, her friend Dean Lewis, Mr Walied Ismail and Dr de la Cruz. The defence consisted of the evidence of the Appellant. The complainant testified

that at the field the Appellant pushed her down and that appellant raped her vaginally and thereafter anally and that when the appellant moved away she ran for help. Walied Ismail confirmed seeing appellant fastening his pants when he went out in response to the complainant's cry for help. The appellant's version in evidence was that the complainant went to the park, lay on the ground and demanded sexual intercourse. Appellant's version as put to the witnesses by his legal representative was contrary to the appellant's evidence. Appellant denied that he had sex with the complainant but under cross examination, appellant confirmed that he told his attorney that he had consensual sex. Appellant could not explain this contradiction.

[9] The magistrate set out the common cause facts and the differences in the evidence and thereafter went on to conduct a critical evaluation of the evidence. The magistrate exercised caution by giving due consideration to the complainant being a single witness as to what occurred on the field and the fact that the complainant was 16 years at the time of trial and 15 years at the time of the offence being committed. The magistrate evaluated the discrepancies in the complainant's statement to the police and to the doctor.

[10] I am satisfied on an examination of the recorded evidence that there was no misdirection by the magistrate in her finding that the State proved its case beyond reasonable doubt, in her accepting the

evidence of the complainant and in rejecting the appellant's version of events which was of a particularly poor quality.

[11] I therefore find that there is no merit in the appeal against conviction and that the appellant was properly convicted by the magistrate.

Appeal against sentence

[12] The offences of which the appellant was convicted were subject to the minimum sentence provisions. In terms of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 the offences are referred to in Part 1 of Schedule 2 (the victim is raped more than once and the victim is under 16 years) and therefore life imprisonment was applicable unless in terms of Section 51(3) substantial and compelling circumstances existed which justified the imposition of a lesser sentence.

[13] The factors in considering sentence were set out in detail by the magistrate in her judgment. She took into consideration the appellant's personal circumstances including his previous convictions and the probation officer's report. The appellant was 33 years, unmarried with one child of 15 years. The child lived with his mother. The appellant was unemployed. He left school after standard three, never held a permanent position but did temporary work from time to time. He had from a young age a history of drug abuse, involvement in gang activities and in criminal activity. The appellant was in custody

awaiting trial for 14 months. It needs to be mentioned that immediately prior to the commission of this offence, the appellant was an awaiting trial prisoner on another charge and only released from prison thereon shortly before this offence was committed.

[14] The Magistrate considered the aggravating factors to be that the appellant knew the complainant's family, that the complainant trusted him, that he used a knife to subdue the complainant and that after he penetrated her vaginally, he proceeded to penetrate her anally. The mitigating factors were considered to be that the complainant did not sustain any serious physical injury of a permanent nature. The magistrate considered the traumatic effect of the incident on the complainant as an aggravating factor especially having regard to the victim impact report.

[15] The magistrate identified that the appellant was in custody for 14 months awaiting trial and that the complainant was 15 years and four months when the rapes occurred and that these were substantial and compelling factors to warrant a deviation from the minimum sentence. In the circumstances, the magistrate found that a deviation from the minimum sentence was justified. She accordingly imposed ten years imprisonment on each count instead of the minimum sentence of life imprisonment on each count. She also ordered that the sentences should not run concurrently thus making it an effective 20 years imprisonment

[16] The grounds for appeal against sentence are that-

[16.1] the magistrate misdirected herself in overemphasising the interests of the community and underemphasising the interests of the appellant;

[16.2] the magistrate erred in not taking into account the element of mercy that should have been afforded to the appellant;

[16.3] the sentence is startlingly inappropriate and induces a sense of shock; and

[16.4] in the light of the merits of the case, another court will come to a different conclusion.

[17] I am unable to find substantiation for the grounds of appeal against sentence as submitted by the appellant in relation to the over-emphasis of the interests of the community and an under-emphasis of the interests of the appellant or in relation to the element of mercy not being taken into account.

[18] On analysis of the record, the question raised is whether the 14 month awaiting trial period is a substantial and compelling circumstance especially in light of the minimum sentence of life imprisonment. I am of the view that the period in custody awaiting trial of 14 months falls into insignificance where the prescribed minimum sentence is life imprisonment and cannot in such circumstances be regarded as a substantial and compelling circumstance.

[19] Secondly, in circumstances where the legislator has set the age of the victim at 16 years as the determining factor, the question is whether the proximity of the age of the victim to 16 years could be regarded as a substantial and compelling circumstance. Even though Section 28 of the Constitution (108 of 1996) defines children as persons under the age of 18, in determining the prescribed sentences, the legislature has considered the age of the victim less than 16 years to warrant more serious consideration.

[20] In this matter the Magistrate stated that the complainant was eight months short of 16 years and therefore had a little more life experience than a very young child and therefore a bit more ability to deal with the trauma. This argument is flawed as the offence of rape is traumatic for a victim of any age. This is particularly difficult to comprehend in this matter where the victim impact report to which the magistrate referred in her judgment clearly indicates the trauma and effect on the complainant. It was reported that the complainant is repeating a grade and has become withdrawn since the incident. The teacher reported that she is always alone with no friends around, does not participate in activities and that she is not the friendly and playful child she used to be. The complainant's mother reported to the probation officer that she was rebellious after the incident and has become aggressive. The probation officer's evaluation indicates that since the incident the

complainant has difficulty making rational decisions and that she was very traumatised at the time of the interview.

[21] It is trite that the offence of rape is considered as one of the most serious crimes and that it should attract severe punishment. In *State v Chapman* 1997 (3) SA 341 (SCA) at page 344 the court remarked:

> "Rape is 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. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation"

The Court further remarked at page 345-

> "The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall have no mercy to those who seek to invade those rights."

[22] More recently, in *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) at 577 *g-i* the Court stated-

> "Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society. Our courts have an obligation in imposing

sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by the law- abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system".

[23] In reviewing whether the sentence is an appropriate sentence in the circumstances where there were many aggravating factors and where the only mitigating aspect which the magistrate found was that the complainant did not suffer any physical injury of a lasting nature, it is noted that the magistrate did take into account the cumulative effect of the period of imprisonment.

[24] After reading the record and the written submission, counsel was asked to make submissions as to why the sentence should not be increased in the event of the appeal being dismissed on the merits.

[25] Ms Adams for the appellant, referred this court to two Supreme Court of Appeal decisions in *S v Vilakazi* 2009 (1) SACR 552 (SCA) and *S v Mahomatsa* 2002 (2) SACR 435 (SCA) where sentences of 15 years and 20 years effective imprisonment were imposed where the Court was of the view that life imprisonment was to be reserved for the more serious cases.

[26] In *S v Ndzima* 2010 (2) SACR 501 (ECG) Plasket J stated that-

"The purpose of the power to increase sentence on appeal was spelt out in *S v Sonday and Others* as follows:

'In criminal cases which come before it on appeal, this Court has a duty, not only to the appellants concerned, but also to society as a whole. That duty is, broadly speaking, and subject to certain rules and D qualifications, to see to it that miscarriages of justice which may have occurred in the courts *a quo* are set right. Thus, towards an appellant or an accused whose case comes before this Court on automatic review, this Court has a duty, *inter alia*, to set aside a conviction or a sentence which this Court finds to be vitiated by misdirection, or a sentence which this Court finds to be shockingly or strikingly or disturbingly too E severe and, in appropriate circumstances, to substitute a proper sentence. Towards society, this Court's concomitant duty is to ensure, in all cases with which it is properly seised on appeal, that proper and adequate sentences are imposed, so that society can be appropriately protected against criminal activities, *inter alia*, by the deterrent effects of those sentences. A sentence which is shockingly or strikingly or F disturbingly too light is as much a miscarriage of justice as one which is shockingly or strikingly or disturbingly too heavy.'

[27] The power of a court to interfere with the sentencing discretion of a trial court is limited. The limits were set out as follows in *S v Malgas* 2001 (1) SACR 469 (SCA) -

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence

arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as shocking, startling or "disturbingly inappropriate. It must be emphasised that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

[28] In my view, there is a sufficiently substantial disparity between the sentences imposed by the trial court and those prescribed in terms of the minimum sentence legislation. It is accordingly justifiable to interfere with those sentences.

[29] When one has regard to the question of the imposition of the minimum sentence, Marais J A stated in *S v Malgas* (supra) at page 481, -

"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. ..... Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.....account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be

assessed paying due regard to the bench mark which the Legislature has provided. "

[30] The recent Supreme Court of Appeal decision in *S v Matyityi* 2011 (1) SACR 40 (SCA) reaffirmed the *Malgas* decision. Ponnan, J A stated

"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 sentences 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 for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and 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."

[31] In another recent Supreme Court of Appeal decision, *S v PB* 2011(1) SACR 448 (SCA) the Court confirmed the trial court's decision that as no substantial and compelling circumstances were present, there was no justification to deviate from the minimum sentence.

[32] Of further relevance in *S v PB* (supra) is an issue which all our Courts should be taking into consideration and which is of particular relevance in this matter where the appellant did not use a condom. Tshiqi J A stated at 455

> "The appellant did not use a condom. This is yet another aggravating factor, specifically at a time when the whole world is grappling with the scourge of the HIV and Aids pandemic. The majority of rape victims are only left to deal with the physical, emotional and psychological trauma of the rape, but are also exposed to the possible hardships associated with living with HIV, its side effects and stigma. The only manner in which victims may be protected is through anti-retroviral drugs, which also have side effects. It is not clear *ex facie* the medical report (J88) whether or not this precaution was taken with regard to this young girl. No evidence was led in this regard."

This is yet another aggravating factor which counts against the appellant.

[33] Having regard to the above, it is evident that the finding that there were substantial and compelling circumstances warranting a deviation from

the minimum sentence prescribed was incorrect. Thus in the circumstances, where there were no substantial and compelling circumstances, regard must be had to the minimum sentence applicable.

[34] The prescribed minimum sentence of life imprisonment in this case is applicable as there are no substantial and compelling circumstances present to justify a deviation.

[35] In the result, I propose that:

[1] the appeal against convictions and sentences is dismissed

[2] the convictions are confirmed

[3] the sentences of ten years imprisonment imposed on each count are set aside

[4] a sentence of life imprisonment is imposed in respect of each of the two convictions of rape.

GANGEN A J

I agree and it is so ordered.

ERASMUS, J