IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A216/2012

DATE: 14 SEPTEMBER 2012

In the matter between:

ALLISTAIR MARINUS Appellant

and

THE STATE Respondent

J U D G M E N T

STELZNER, AJ:

The appellant was convicted on two charges of rape for which he was sentenced to 12 years direct imprisonment on each count, which sentences were to run concurrently. In addition the appellant was convicted on one count of possession of a dangerous weapon, a knife, and two counts of robbery with aggravating circumstances. The last three counts were taken together for purposes of sentence. The appellant was sentenced to a further 8 years direct imprisonment on two of these three counts and to one year on the remaining count. These sentences were to run concurrently. As a result the

appellant was sentenced to an effective term of 20 years direct imprisonment. This appeal is against sentence only with the leave of the High Court on petition.

In summary the sentences are as follows: In respect of one count of rape, which was count three in the court *a quo*, twelve years imprisonment. In respect of count four, a further rape charge, twelve years imprisonment. These two sentences were to run concurrently. Count five in the court *a quo*, of which the appellant was found guilty, was that of being in possession of a dangerous weapon. Count six was robbery with aggravating circumstances. Counts five and six were both taken as one for purposes of sentence. The sentence in respect of count seven and the robbery of one of the other complainants was one year imprisonment. It was ordered that counts three and four run concurrently. Count seven was to run concurrently with counts five and six.

The offences were all committed on 5 September 2005. At the time of the commission of the offences the appellant was 17 years old and 8 months. The appellant was sentenced on 26 February 2007. At the time of sentence he was 19 years old. He spent two years in custody awaiting trial.

The matter was approached on the basis that section 51(ii) and

parts 2 of schedule 2 of Act 105 of 1997, the Minimum Sentences Act applied. At the time of sentence, judgment in the matter of Centre for Child Law v Minister of Justice 2009(2) SACR 477(CC), had not yet been handed down. In that matter the Constitutional Court declared *inter alia* section 51(2) of the Criminal Law Amendment Act 105 of 1997 to be unconstitutional on the basis that it constituted an unreasonable limitation of section 28(1) (g) of the Bill of Rights, which provides *inter alia* that:

> "Every child has the right not to be detained, except as a measure of last resort, in which case the child may be detained only for the shortest appropriate period of time and his the rights to be kept separately from detained persons over the age of 18 years and treated in a manner and kept in conditions that take account of the child's age".

In paragraph 32 of the judgment Cameron, J held as follows.

In short section 21(8)(g) requires that individuated judicial response to sentencing, one that focuses on the particular child who's being sentenced rather than an approach encumbered by the rigid starting point that minimum sentencing entails. The injunction that the child may be detained only for the shortest: "appropriate", period of time

relates to the child and to the offence he or she has committed. It requires an individually appropriate sentence.

The declaration of invalidity has the result that this Court is now in a position to consider the sentence to be imposed afresh. Although counsel for the appellant and for the state did not refer the Court to this judgment of the Constitutional Court in their heads of argument, they were in agreement during argument that this is the approach to be adopted. It is also consistent with the principle of *nulla poena sine lege* and the principle that if the punishment to be imposed is changed before the accused is sentenced, the old punishment must not be applied to the detriment of the accused. Section 35(iii)(n) of the Constitution provides further that an accused has a right to benefit from the least severe of the prescribed punishments where the prescribed punishment has changed from the time that the offence was committed to the time when the sentence is to be imposed.

These principles apply equally to an appellant who has taken his sentence on appeal. Although section 51(ii) of Act 105 of 1997 had not been declared unconstitutional at the time that the matter served before the court *a quo*, it has now been declared unconstitutional, with the result that this Court is both entitled and required to approach the issue of sentencing

afresh and not on the basis that there was or is a minimum sentence applicable. To quote from S v Malgas 2001(1) SACR 469 (SCA) at 8: "This court has a clean slate on which to inscribe whatever sentence it deems fit".

The facts of the matter are as follows. On 5 September 2005 and at Lotus River, Western Cape, the appellant raped two sisters, Yumna Davids, aged 16 and Quaaneta, aged 19. The girls had been sent by their mother to buy carrots from a shop some 15 minutes from their home. The appellant first demanded their cell phones from them which they did not have and thereafter forced them to accompany him to a nearby clinic. They accompanied him because they feared for their safety, thinking he was armed, possibly with a gun. He subsequently threatened them with a knife and ultimately stole a gold bangle and earrings from Yumna and a watch from Quaaneta. Both girls were severely traumatised by the rape and robbery. The one was forced to watch the other being raped, both required surgery, both were virgins. The trauma suffered by them is apparent. Their families were also severely affected by the events. (Quaaneta as a result of excessive teasing thereafter left school prematurely.)

The appellant denied that he was the culprit. He did not appear to show any remorse for his actions. His personal

circumstances are as follows. He resided in Ottery with his grandmother, his mother and his aunts, as an only child. His father was sentenced to imprisonment for 15 years in 2004 having been arrested in 2001. He left school in standard 6 in order to assist his mother financially by selling roses when his father was incarcerated. At once stage he used drugs but for the two years awaiting trial he no longer did so. In Pollsmoor prison, where he occupied a single cell, presumably because of his youthfulness, he participated in what is referred to in the heads of argument for the appellant as: "die kerklike kamer", which is understood to mean that he had attended spiritual or religious sessions, possibly also indicative of an attempt at rehabilitating himself.

He stated to the Court that he would have preferred to complete his schooling and had he still been at school would've enjoyed continuing with his sports activities, more particularly soccer. He had previous convictions for theft.

It was argued on his behalf that the two years in custody should have been taken into account in determining an appropriate sentence and that the sentence in respect of all the charges should have run concurrently.

The magistrate considered the seriousness of the offences in

determining sentence, including the fact that they were committed in daylight and both complainants suffered serious physical injuries as well as severe emotional trauma. The actions of the accused were described as cruel and rightly so.

Taking into account the interest of the community, the protection the community expects against such acts, the importance of deterrents, particularly for other offenders and the cruelty ("die boosheid") of the appellant, the court *a quo* came to the conclusion that these factors overweighed his youthfulness and the minimum sentence was imposed. The magistrate found that although there were mitigating circumstances, there were no substantial or compelling reasons to not impose the minimum sentence for rape.

In respect of the rape charges, two years more than the minimum sentence of 10 years for a first offence were in fact imposed. The robbery charges, which have a minimum sentence of 15 years, were however met with 8 years direct imprisonment. This was essentially, it appears because there were no injuries during the course of the robbery.

It is difficult to fathom exactly why the magistrate distinguished between the robbery charges and the possession of the dangerous weapon on the one hand, yet on the other

hand treated the two rapes as having occurred sufficiently, closely connected to each other in order for a concurrent sentence to be imposed in respect of the rapes, but not in respect of the robbery charges.

In my view the robbery charges are more closely connected to the rapes than the two rapes to each other. There is no appeal against the magistrate having treated the two rapesn together for purposes of ordering a concurrent sentence in respect of those rapes. All the criminal acts took place in the same circumstances on the same day, as part the same series of events. The cumulative effect of the sentences was that the accused was sentenced to 20 years imprisonment for a series of acts which all occurred on the same day within the space of roughly an hour.

Section 280(2-3) of the Criminal Procedure Act, permit the sentencing court to order the various sentences it has imposed to run or that they be served concurrently, provided all the sentences consist either of imprisonment or correctional supervision. The court may also order any part of a sentence to run concurrently with any part of another sentence. In S v Mpofu 1985(4) SA 322 (ZAC) 324(g-j) the following was stated:

"In all multiple crimes the courts pay regards to what Thomas Principles of Sentencing, Second Addition

(1979)(56), describes as the totality principle. The court must look at the totality of the criminal behaviour and ask itself, what is the appropriate sentence for all the offences. In effect the accused normally receives a discount for bulk offending, particularly where the various counts are similar in nature for the imposition of a separate and consecutive sentence for each individual charge, would result in a very high aggregate penalty, which would be disproportionate to the moral of blameworthiness of the accused, having regard to his line of conduct as a whole. The need to give a "discount" is particularly important where the various charges are essentially part of the same course of action of the same event."

In my view it is not only this factor but also the youthfulness of the appellant at the time of the offences, which did not receive the necessary recognition by the Magistrate and which, together with the view that the minimum sentences applied, led to a sentence which I consider to have been disturbingly inappropriate.

In S v N, 2008(2) SACR 135 (SCA) at para 36 Cameron, JA as he then was, in dealing with the single rape of a school friend, said as follows:

"A vulnerable young girl ...had taken from her by force her ultimate sexual intimacy after she refused to grant it. He did so in a wilful act of domination and bodily intrusion that left her physically bruised and emotionally shaken. Some of his actions afterwards displayed a bare arrogance that makes it hard to warm to him as a sentencing subject".

Paragraph 38 of the same judgment, Cameron, JA, dealt with the fact of youth in deciding what this meant for sentence. The learned Judge of Appeal (as he then was) firstly,

"Youth gives us no warrant to sentimentalise him or any other child. He was a fit and able young man with the capacities of choice, who on this occasion grossly violated another".

In paragraph 39 of the judgment, the constitutional injunction is referred to the court is required to weigh in the mix the fact that the appellant is a minor.

S v N is admittedly distinguishable from the present matter, giving the extremely callous nature of the crime *in casu* on the facts, including the fact that the rapes were premeditated.

Considering all the circumstances and looking at the totality of the criminal behaviour and the appellant's youthfulness, I am of the view that the cumulative effect of the two sets of sentences in respect of the two rapes and in respect of the two robberies should be prevented. I intend doing so by ordering all the sentences to run concurrently.

The robbery and the rape counts may be slightly dissimilar in nature, but in the circumstances of this matter, given the fact that the robbery essentially formed part of the same course of action as the rapes, I am of the view that it would be appropriate for the sentences in respect of the robbery charges to run concurrently with the rape charges.

This brings one to consideration of what would be an appropriate sentence in respect of the separate offences. The magistrate in the court a quo imposed 12 years direct imprisonment in respect of the rapes.

In S v Chapman 1997(2) SACR 3 (SCA) the offence of rape is described as follows:

> "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 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 show no mercy to those who seek to invade those rights."

The sentence of 12 years imposed by the magistrate for these two crimes, in my view, strikes the right balance between the appellant's youthfulness and the severity of the crime, the interests of the community and the factors to be taken into account in sentencing. Particularly given the fact that the appellant also spend some two years awaiting sentence in custody, this would make such a sentence appropriate.

The term of eight years imprisonment, in respect of the robbery, may also on its own have been an appropriate sentence, taking into account that a large knife, half the size of a 30cm ruler, was used to callously steal from the complainants personal items.

In addition the prevalence of the crime of robbery and the seriousness thereof, would have justified such a sentence in circumstances where the accused was not a youth.

Were this sentence to run concurrently with the one for the rapes, the effect thereof would be that the appellant is sentenced to a total period of 12 years imprisonment, in respect of all of that which occurred on the day in question.

This in my view strikes the necessary balance between the appellant's youthfulness and all the other factors referred to herein and would constitute a sentence which is not disproportionate.

I would uphold the appeal against sentence and impose a sentence of imprisonment of 12 years in respect of the two counts of rape, 8 years in respect of the two counts of robbery and the one count of possession of a dangerous weapon and order further that all the sentences are to run concurrently, with the result that the appellant will serve an effective 12 years imprisonment in respect of all the charges.

The order I propose making is as follows:

1. The appeal against sentence is upheld.
2. The appellant is sentenced to 12 years imprisonment on each count of rape.
3. On count 5 possession of a dangerous weapon, count 6 and 7 robbery, the appellant is sentenced to undergo a

term of imprisonment of 8 years.

4. The sentences in counts 4, 5, 6 and 7 are ordered to run concurrently with the sentence in respect of count 3.

5 The sentences are antedated to 26 February 2007. Effectively the appellant is sentenced to a period of 12 years imprisonment with effect from 26 February 2007.

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STELZNER, AJ

15 I agree.

NDITA, J