Republic of South Africa

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

REPORTABLE

Case Number: A490/2013

In the matter of:

CALWYN UITHALER Appellant

versus

THE STATE Respondent

Before : Zondi J and Van Standen AJ

JUDGMENT DELIVERED ON 10 FEBRUARY 2014

ZONDI, J

[1] The appellant together with his co-accused appeared in the George Regional Court facing two counts of rape. It was alleged in the charge sheet that on two occasions on 1 April 2007 the appellant had

sexual intercourse with a female complainant without her consent. The charges were subject to the provisions of section 51 of Act 105 of 1997 (the Minimum Sentence Act) as the complainant was raped more than once.

[2] The appellant, who was legally represented, pleaded guilty to both counts. His plea was accepted by the State. The trial court convicted the appellant as charged in accordance with his plea. It took both counts together for the purposes of sentence and sentenced him to twenty eight years imprisonment. The appellant appeals against the sentence only with the leave of this court.

[3] The offence was committed in the circumstances as set out in the appellant's plea statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 (the Act). On the day in question the appellant and his co-accused approached the complainant while relaxing with her male companion at the back of a bakkie which was parked in an industrial area in George. The appellant forced the complainant to accompany him into nearby bushes where he proceeded to rape her vaginally. Thereafter he instructed the complainant to turn and lie on his stomach and penetrated her anally. When he was finished, his co-accused proceeded to rape the complainant. Whilst the complainant was

being sexually assaulted her male companion managed to escape and alerted the police who immediately responded. The appellant and his co-accused were still on the scene when the police arrived and in fact his co-accused was still raping the complainant. On seeing the police the appellant and his co-accused fled the scene.

[4] Shortly after the incident the complainant was taken to George Hospital for medical examination and treatment and the doctor who examined her recorded his findings and conclusion on the J88 medico-legal report.

[5] On examination the complainant was found to have had a swollen urethral orifice, labia majora, labia minora and hymen. Her vagina was bleeding. Anal examination was, however, not conducted. According to the J88 medico legal report the complainant was born on 17 March 1982. It is unfortunate that there is no evidence regarding the extent to which the entire ordeal has affected the complainant and her attempt to cope with it. Such evidence could have been placed before the trial court by way of a victim impact report if for some other reason the complainant was unable to testify. This evidence is necessary as it assists the sentencing court to undertake the determination of the appropriate sentence not only from the offender’s perspective but also from the

complainant's perspective. (*S v Vilakazi* 2009 (1) SACR 552 (SCA) paras 56 – 57).

[6] The appellant was twenty two years old at the time of the incident. He is single and has no dependents. He passed grade 6 and was employed as a labourer by a garden services company. He earned R70-00 per day. He is not a first offender. He has four previous convictions for house-breaking with intent to steal and theft the last of which was committed on 29 July 2003.

[7] The trial court considered both evidence in mitigation and aggravation and concluded that there were substantial and compelling circumstances justifying the deviation from imposing a prescribed minimum sentence of life imprisonment. On the basis of such finding it sentenced the appellant to twenty eight years' imprisonment having taken both counts together for the purpose of sentence.

[8] The sentence is attacked on the ground that it is shockingly inappropriate. It is contended that although the trial court found that there were substantial and compelling circumstances it failed in its assessment of the appropriate sentence to give sufficient and adequate weight to this finding. It was argued by Ms Mahlasela appearing for the

appellant, first, that the offences were not premeditated; secondly, no weapons were used during the commission of the offence and, thirdly the two rapes occurred almost immediately and were closely connected in terms of time and place. In my view the appellant's third leg of attack on the sentence is without basis. It is clear to me that the trial court was alive to the fact that the offences are interconnected and for that reason took the two counts together for the purposes of sentencing. This it did to ameliorate the cumulative effect of the sentence had it imposed a separate sentence for each of these offences.

[9] The question is whether the sentence imposed by the trial court is shockingly excessive in the manner suggested by counsel for the appellant. It is beyond question that the sentencing court should impose an appropriate sentence based on all the circumstances of the case and should reflect the severity of the crime, the blameworthiness of the offender and serve the interest of society (*S v Zinn* 1969 (2) SA 537 (A)). In the interests of society the purposes of sentencing are deterrence, prevention, rehabilitation and retribution. It is important to emphasise that public sentiment cannot be ignored, but "*it can never be permitted to displace the careful judgment and fine balancing*" that is involved in arriving at an appropriate sentence (*S v SMM* 2013 (2) SACR 292 (SCA) at 297 C).

[10] The abuse of women and children especially girl children is rife in this country. As the Constitutional Court put it in *F v Minister of Safety and Security* 2012 (3) BCLR 244 (CC) at para [56] : "*The threat of sexual violence to women is indeed as pernicious as sexual violence itself. It is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self determination of women. It is deeply sad and unacceptable that few of our women or girls dare to venture into public spaces alone, especially when it is dark and deserted. If official crime statistics are anything to go by, incidents of sexual violence against women occur with alarming regularity. This is so despite the fact that our Constitution, national legislation, formations of civil society and communities across our country have all set their faces firmly against this horrendous invasion and indignity imposed on our women and girl-children"*.

[11] The offences with which the appellant was charged, and convicted of, are subject to the provisions of section 51 of the Minimum Sentence Act and Marais JA reminds us in *S v Malgas* 2001 (1) SACR 469 (SCA) at para [25] that Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed and that if there is sufficient basis for deviation

from imposing the prescribed minimum sentence, 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.

[12] The trial court found that there existed substantial and compelling circumstances justifying a departure from the minimum sentence. Its finding was based on the fact, first, that the appellant was a first offender in relation to sexual offences, secondly, had pleaded guilty, thirdly, he did not use excessive force in the commission of the offence to the extent that the complainant suffered no other serious physical injuries and fourthly, his relative youthfulness increased his prospects of rehabilitation. The trial court as I have already pointed out took counts 1 and 2 together for the purposes of sentence and sentenced the appellant to twenty eight years' imprisonment. It is necessary to comment on the third factor, namely absence of serious physical injuries, which the trial court took into account in its consideration of the substantial and compelling circumstances. The fact that the victim of sexual assault suffered no physical injury in the course of the assault does not in my view, render the crime of rape less reprehensible. As the SCA observed in *S v SMM, supra* at para 17: "*rape is undeniably a*

degrading humiliating and brutal invasion of a person's, most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way" (footnote omitted). See *S v Chapman* 1997 (3) SA 341 (SCA). I fully agree with these sentiments.

[13] The facts which the appellant admitted in his plea statement established in relation to the first count that he raped the complainant by penetrating her vaginally and in relation to the second count that he penetrated her anally.

[14] On reading the record I entertained some doubt as to whether the facts he admitted in relation to the second count on which he pleaded guilty constituted a crime of rape. I informed both counsel that when the appeal is argued they would be required to address the Court on whether the appellant's guilty plea to the second count was appropriate having regard to the fact that the crimes were committed on 1 April 2007 before the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 came into operation.

[15] Both counsel agreed that the facts the appellant admitted in his

plea statement and on which he was convicted did not constitute a crime of rape at the time of the commission of the offences but indecent assault and that the appellant should therefore have been charged with indecent assault. Counsel for the State informed the Court that the State's decision to charge the appellant with a crime of rape on the second count was as a consequence of its misinterpretation of the Constitutional Court judgment in *Masiya v Director of Public Prosecutions* 2007 (2) SACR 435 CC delivered on 10 May 2007 which extended the definition of the crime of rape to include the crime of indecent assault which the State believed applied retrospectively.

[16] The trial court misdirected itself in sentencing the appellant on the basis that he had committed two rapes. The evidence as set out in his plea statement, which formed the basis of his conviction on 28 October 2008 makes it clear that the appellant sexually assaulted the complainant by penetrating her, first, vaginally and secondly, anally. The offences according to the charge sheet occurred on 1 April 2004 during which time the crime of anal penetration constituted indecent assault not rape. The offence of anal penetration became a crime of rape as a result of the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act) which *inter alia* repealed the common-law crime of rape and replaced it with an

extended statutory crime of rape. It also repealed the common law crime of indecent assault and replaced it with a statutory crime of sexual assault, applicable to all forms of sexual violation without consent (Snyman, Criminal Law 5th ed at 353). The Sexual Offences Act came into operation on 16 December 2007.

[17] Section 69, which deals with transitional provisions, provides as follows:

> "***69 Transitional provisions***
>
> *(1) All criminal proceedings relating to the common law crimes referred to in section 68 (1) (b) which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act must be continued and concluded in all respects as if this Act had not been passed.*
>
> *(2) An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted one of the common law crimes referred to in section 68 (1) (b) which was initiated before the commencement of this Act may be concluded, instituted and continued as if this Act had not been passed.*
>
> *(3) Despite the repeal or amendment of any provision of any law by this Act, such provision, for purposes of the disposal of any investigation, prosecution or any criminal or legal proceedings*

contemplated in subsection (1) or (2), remains in force as if such provision had not been repealed or amended."

[18] This section must be read with section 68 in particular section 68 (1) (b) which repeals the common-law crimes of rape and indecent assault, among other offences with the result that sexual offences such as these before us committed before the commencement of the Act are punishable under the common law not under the Sexual Offences Act.

[19] The appellant was not charged with the statutory crime of rape under the Sexual Offences Act. There is no reference in the charge sheet to the provisions of that Act. The charges are framed under the common law and are subject to the provisions of section 51 of Act 105 of 1997. In *S and Another v Acting Regional Magistrate, Boksburg and Another* 2011 (2) SACR 274 (CC) at para [17] Mthiyane AJ writing for that Court made it clear that there is nothing express or implied in section 68, to the effect that the common-law crime of rape is repealed retrospectively . He explained that if this section had been intended to apply retrospectively it would result in the extinction of criminal liability incurred before the commencement of the Act. He went on to consider whether section 69 has the retrospective effect. After analysing the text of section 69 and the objects of the Sexual Offences Act, Mthiyane AJ

held that the section does not apply retrospectively and did not apply to prosecutions not yet instituted. I would be surprised if it did because in our common law there is a presumption against retrospectivity. It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication (*S and Another v Acting Regional Magistrate, Boksburg supra* at para [15] and the cases therein cited.

[20] In light of this analysis it is clear that the State improperly charged the appellant with rape on count 2 and the appellant's guilty plea to that charge was thus in error. He should have been charged with, and, convicted of, indecent assault. Conviction of rape on count 2 can therefore not stand. It should be set aside and substituted with one of indecent assault. For purposes of sentence both counts will be taken together as the trial court did.

[21] The trial court found that substantial and compelling circumstances were present in this matter which justified it to impose a lesser sentence and substantiated the basis of its finding. It took both counts together for the purposes of sentence and proceeded to sentence the appellant to twenty eight years' imprisonment. That sentence was predicated on the basis that the appellant had been convicted of two counts of rape. In

light of the fact that the basis upon which the sentence of the trial court was premised was incorrect, it must follow that it should be set aside and substituted with a correct one. The sentence to be imposed must however remain severe as it should be assessed having regard to the fact that the legislature has singled out the crime of rape for severe punishment.

[22] Taking all the circumstances of the case I am of the view that the sentence of twenty years' imprisonment would be appropriate. The appellant has been serving his sentence since 28 October 2008 when he was sentenced. The sentence should be antedated accordingly.

[23] In the result the following order is made:

1. The appeal against sentence succeeds and the sentence of twenty eight years imprisonment is set aside and replaced with the following sentence:

   "*The accused is sentenced to 20 years' imprisonment*".

2. The sentence is antedated to 28 October 2008.

ZONDI, J

I agree.

VAN STADEN, AJ