Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A286/17

In the matter between:

SIPHO WANGA **Appellant**

and

THE STATE **Respondent**

Court: Justice A Le Grange *et* Justice J Cloete

Heard: 3 November 2017

Delivered: 3 November 2017

JUDGMENT

CLOETE J:

[1] The appellant was convicted in the Parow regional court on one count of rape of an 8 year old girl and sentenced on 26 April 2016 to 20 years imprisonment.

The trial court granted him leave to appeal against both conviction and sentence. He persists with his appeal against sentence only.

[2] The facts found proven were briefly as follows. The complainant and her family were neighbours, although not friends, of the appellant and his family. On 27 February 2015 the complainant was playing at the appellant's home with his 7 year old son. He sent his son to a shop to buy bread and pulled the complainant into his bedroom. He forced her onto his lap and after her panties and trousers were removed attempted to penetrate her vagina with his penis. He was not successful and fetched cooking oil from the kitchen which he smothered on his penis and her private parts, thereafter managing to penetrate her vaginally. He was caught red handed by the complainant's mother who came to fetch her.

[3] The doctor who examined the complainant found fresh abrasions in the vestibule area of the vagina which he concluded was consistent with penetration beyond the labia minora but not beyond the hymen. There were no other physical injuries.

[4] The appellant maintained his innocence throughout and tried to portray the complainant as a liar. He showed no remorse even after his conviction and before he was sentenced.

[5] Given that this was the rape of a child under the age of 16 years, it attracted a minimum sentence of life imprisonment in terms of s 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (*'the Act'*) unless the court found the existence of substantial and compelling circumstances such as to justify a deviation from the prescribed minimum in terms of s 51(3) thereof. The trial court essentially found that the only factor justifying such a deviation was that there was always a chance the appellant could be rehabilitated while serving his sentence, and thus imposed a lesser sentence of 20 years imprisonment.

[6] The magistrate reasoned that there are no degrees of seriousness when it comes to rape; the lack of physical injury was neutralised by the severe long term emotional and psychological impact on the complainant as was abundantly clear from the evidence, including the victim impact report handed in without objection by the defence; the appellant showed no remorse; his personal circumstances, although objectively favourable, were insignificant weighed against the gravity of the offence; and members of society demanded the imposition of a harsh sentence. She also found that the fact that the appellant is a first offender was largely irrelevant given that the Act itself stipulates a minimum sentence of life imprisonment for a first offender for the rape of a child below the age of 16 years.

[7] Although the trial court also referred to the proportionality requirement, which it is settled law continues to apply even to offences covered by the minimum

sentence legislation, the appellant effectively submits that she only paid it lip service in that she: (a) gave insufficient attention to his personal circumstances and the fact that he is a first offender; (b) failed to attach sufficient weight to his prospects of rehabilitation; and (c) overemphasised the interests of the community.

[8] On the other hand the State submits that the trial court was too charitable towards the appellant in finding that his possibility of rehabilitation while serving his sentence constituted a substantial and compelling circumstance sufficient to justify a deviation from the prescribed minimum.

[9] At the time of the offence the appellant was 44 years old and had not previously been convicted of any offence. He was in stable employment as a security guard earning R2200 per month. He had been married for 12 years and has 3 children, all of whom, along with his unemployed wife, were dependent on him for financial support. It also appears from the record that he consumed alcohol before committing the offence. He was on bail before his conviction.

[10] In *Malgas*[1] it was made clear that although the legislature ordained that the prescribed minimum sentences are to be regarded as *'ordinarily appropriate'* in the absence of weighty justification to the contrary when crimes of the kind specified are committed, an individualised response to sentencing a particular

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[1] *S v Malgas* 2001 (1) SACR 469 (SCA) at paras [22] – [25].

offender has not been dispensed with by the Act. This approach was approved in *Dodo*[2] where it was held that:

> *'The test in Malgas must be employed in order to determine when section 51(3) can legitimately be invoked by a sentencing court to pass a lesser sentence than that prescribed by section 51(1) or (2). The test of gross disproportionality, on the other hand, must be applied in order to determine whether a sentence mandated by law is inconsistent with the offender's section 12(1)(e) right.'*
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> [Referring to s 12(1)(e) of the Constitution, i.e. the right not to be treated or punished in a cruel, inhuman or degrading way].

[11] In *Vilakazi*[3] the court, while emphasising the brutal and repulsive nature of the crime of rape, went on to say:

> *'...The Constitutional Court reminded us in* S v Dodo *that punishment must always be appropriate to the deserts of the particular offender – no less but also no more – for all human beings "ought to be treated as ends in themselves, never merely as means to an end".'*

[12] At para [58] it was held that:

> *'[58] The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is*

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2 *S v Dodo* 2001 (1) SACR 594 (CC) at para [40].
3 2009 (1) SACR 552 (SCA) at para [3].

married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that Malgas *said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character.'*

[13] In *SMM*[4] it was stated that:

[17] It is necessary to reiterate a few self-evident realities. First, 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 inflected by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way…

[18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the very important remarks in the preceding paragraph. This court held in S v Abrahams *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." The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing. In* Vilakazi *Nugent JA cautioned against the danger of heaping "excessive punishment…on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope that it will arrest the*

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[4] 2013 (2) SACR 292 (SCA).

scourge". He also pointed to the vast disparity between the ordinary minimum sentence for rape (10 years' imprisonment) and the one statutorily prescribed for rape of a girl under the age of 16 years (life imprisonment) and the startling incongruities which may result…'

[14] In *SMM* the complainant was a 13 year old girl and the appellant was her uncle who was sentenced to life imprisonment for her rape.

[15] He had been requested by her mother to assist her with an application for admission to a high school. The appellant was alone when the complainant arrived at his home. He asked her whether she was sexually active. She replied that she was not. He then asked her to show him her panties. She obliged and he forcefully inserted two of his fingers into her vagina. At that point there were voices outside the house. He instructed her to sit on the bed while he went to investigate. He returned moments later and instructed her to undress and also to lie down sideways on the bed. He then forcefully inserted his penis into her vagina. When she started crying, he withdrew and told her to get dressed.

[16] The medical examination revealed that there were no abrasions but that some penetration may have occurred. Forensic evidence showed that the appellant's semen was found on the complainant's panties.

[17] At the time of sentencing in that case the appellant was 47 years old, employed as a taxi driver and earning R1000 per week. His wife was also employed. They

had four children, all of them dependent on their parents for financial support. A previous conviction dated 1998 for assault with intent to do grievous bodily harm was disregarded for purposes of sentence.

[18] The appeal court reasoned that, given his personal circumstances, it could be accepted that the appellant had no propensity to commit crime, which increased his chances of rehabilitation. It found that this was not the most severe form of rape and that the appellant desisted when he realised that the child was crying. There was also no evidence that the child suffered any ongoing trauma, over and above the trauma she would inevitably have experienced as a result of what had happened. The medical report showed that the doctor did not find any serious physical injuries and there was no violence in addition to the rape.

[19] The appeal court referred to *S v Nkawu*[5] where Plasket J was called upon to consider the provisions contained in s 51(3)(aA)(ii) of the Act, namely that when a court sentences for rape *'an apparent lack of physical injury to the complainant'* shall not be regarded as a substantial and compelling circumstance. The appeal court stated at para [26]:

> *'Plasket J expressed the view, correctly as I see the matter, that a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape, which could lead to the imposition of unjust sentences. I agree with the learned judge that "to the extent that the provision restricts the discretion to deviate from a prescribed sentence in order to ensure a*

[5] 2009 (2) SACR 402 (ECG).

proportional and just sentence it would infringe the fair trial right of accused persons against whom the provision was applied". He correctly in my view concluded that the proper interpretation of the provision does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence. To this one must add that it is settled law that such factors need to be considered cumulatively, and not individually.'

[20] The appeal court considered the factors referred to above to be mitigating and weighed them against its finding that the appellant abused his position of trust and showed no remorse by denying in court that the incident had taken place. Instead of taking responsibility for what he had done, he sought to make the complainant a liar and thus in effect victimised her again.

[21] It concluded at para [28]:

'Having weighed the mitigating factors against the aggravating ones, the imposition of the statutorily prescribed minimum sentence by the high court was in my view grossly disproportionate to the offence. This court is therefore obliged to set it aside and impose a fresh sentence. The offence is, nonetheless, deserving of severe punishment so as to convey the gravity of the offence and society's justified abhorrence thereof. I am of the view that a sentence of 15 years' imprisonment would meet the objectives of sentencing and would fit the crime, the criminal and the needs of society…'

[22] Having regard to these legal principles contained in the decisions of our highest courts, by which we are of course bound, I am of the view that the magistrate's reasoning was flawed in certain respects. However, the question nonetheless remains whether or not the sentence of 20 years

imprisonment should be substituted with another sentence. Although the magistrate's reasoning may have been flawed this does not necessarily mean that she committed a material misdirection in the result, or that the sentence imposed is shocking, startling or disturbingly inappropriate (per *Malgas*).

[23] On the one hand the complainant was merely 8 years old and the rape was only stopped because her mother interrupted the appellant. There was a degree of violence involved to subdue the complainant and all indications are that the appellant was intent on raping the complainant by fully penetrating her vaginally, given that he fetched oil and used it to make penetration easier. There was also sufficient evidence placed before the trial court of the severe emotional and psychological effect on the complainant. The magistrate who had the benefit of observing her when she testified was struck by how traumatised she still was.

[24] On the other hand, the appellant's personal circumstances are indeed favourable and are not indicative of a propensity to commit serious crime or of an inherently lawless character. It also seems that alcohol may have played a role and that the offence was committed somewhat opportunistically.

[25] To my mind however, and taking into account all relevant considerations, it cannot be said that the trial court erred in the result. The appellant, even if he serves the full 20 years, will have a realistic prospect on his release at age 65 of returning to become a productive, law abiding member of society, and he will

not be sacrificed on the altar of deterrence. The sentence also reinforces that harsh penalties are called for in these matters. Rape is a reprehensible crime which shows no sign of abating in this country. Its seriousness and the disregard displayed by perpetrators for the constitutionally entrenched rights of their victims must, as far as possible, be given full weight in every sentencing process.

[26] **I would thus propose the following order:**

1. **The appeal against sentence is refused.**
2. **The appellant's conviction and sentence are confirmed.**

J I CLOETE

LE GRANGE J:

I agree and it is so ordered.

A LE GRANGE