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

Case Number: A 190 / 2022

In the matter between:

MELVIN JACOBS **Appellant**

and

THE STATE **Respondent**

Coram: Wille *et* Thulare, JJ

Heard: 3 February 2023

Delivered: 10 February 2023

JUDGMENT

WILLE, J:

Introduction:

[1] This is an 'automatic' appeal directed against the sentence imposed upon the appellant by the lower court. I say this because the appellant elected to exercise his automatic right of appeal against his sentence of life imprisonment. The appellant was convicted on one (1) count of rape and one (1) count of attempted rape. The appellant pleaded guilty to both the charges formulated by the respondent.

[2] The appellant was sentenced to life imprisonment. Further, it was directed that the appellant's name was to be recorded in the official register for sex offenders and that he was declared unfit to possess a firearm. This is in terms of the appropriate legislation.

Overview:

[3] The grounds of appeal advanced on behalf of the appellant are, in broad terms, the following, namely: (a) that the sentence imposed was shockingly harsh and inappropriate; (b) that the appellant was sacrificed at the altar of retribution, as opposed to that of rehabilitation and, (c) that there were substantial and compelling circumstances present dictating a deviation from the minimum sentencing regime to the benefit of the appellant.

[4] The appellant was arrested on 19 December 2019. He was convicted on 6 July 2022 and sentenced on 7 July 2022. The offences were committed on 19 December 2019. The appellant was fifty-seven (57) years old at the time of his arrest.. When these offences were committed, the complainants were only nine (9) years old.

[5] The appellant was charged with a contravention of the provisions of section 3 read with sections 1, 55, 56 (1), 57, 58, 59, 60, 61 and 68 of the Criminal Law Amendment Act (Sexual Offences and Related Matters)[1], read with sections 256, 257, 261 and 281 of the Criminal Procedure Act 51 of 1977. The provisions of sections 51 and Schedule 2 Part 1 of the Criminal Law Amendment Act, 105 of 1997. The provisions of section 92 (2) and section 94 of the Criminal Procedure Act 51 of 1977 also found application.[2] The rape charge in count one (1).

[6] The charge preferred against the appellant on count two (2) referenced a contravention of the provisions of section 55 read with Chapters 2, 3, 4, sections 1, 56,

[1] Act No, 32 of 2007.
[2] As formulated in count one (1).

57, 58, 59, 60, 61 and 71(1), (2) and (6) of the Criminal Law Amendment Act (Sexual Offences and Related Matters), as well as sections 92 (2) and 94 of the Criminal Procedure Act 51 of 1977. The charge of attempted rape in count two (2).

[7] The respondent accepted the facts in the appellant's statement in his guilty plea. After the arguments on the sentence and acceptance into the record of some additional material, the presiding officer in the lower court found no substantial and compelling circumstances to deviate from the prescribed minimum sentence in connection with the rape charge. The judicial officer in the lower court imposed the prescribed minimum sentence of life imprisonment on the appellant. The two convictions against the appellant were taken together for the purposes of imposing sentence on the appellant. Further, the appellant's rights were correctly explained to him regarding his rights of appeal.

Context:

[8] The appellant admitted: (a) that he became sexually aroused when the two complainants got unto his bed; (b) that he placed the complainant in count one (1) on top of him and he proceeded to sexually penetrate her by placing his penis in her vagina; (c) that a district surgeon examined the complainant in count one (1) and recorded his findings in a medical report; (d) that the penis of the appellant was placed on her *mons pubis* and between the upper part of her *labia majora* ; (e) that no hymenal entrance occurred as evidenced by the bruising to the complainant in count one (1) and, (f) that the complainant in count two (2) sustained no physical injuries.

[9] It was not disputed that both the complainants were nine (9) years old at the time of the commission of the alleged offences. Further, it was not disputed that the appellant attempted to rape the complainant in count two (2). As alluded to earlier, the judicial officer in the lower court concluded that the convictions fell to be taken together to impose a sentence upon the appellant. A penalty of life imprisonment was imposed on the appellant.

[10] The appellant's circumstances were: (a) that the appellant was fifty-seven (57) years old at the time of the commission of the alleged offences; (b) that the appellant was sixty (60) years old at the time sentence was imposed; (c) that the appellant was not married and did not have any children; (e) that the appellant successfully attained grade twelve (12) at school; (f) that the appellant was unemployed; (g) that the appellant received a disability grant; (h) that the appellant has a condition with his legs which requires him to use crutches to enable him to walk; (i) that the appellant was diagnosed with epilepsy a few years before his sentence: (j) that the appellant uses medication daily, and (k) that the appellant was brutally assaulted by the father of the complainant on count two (2), to the point that he lost sight in an eye.

Consideration:

[11] The minimum sentencing regime provides, among other things, that:

'…Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall –

(a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or

(b) if the matter has been referred to it under section 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part 1 of Schedule 2, sentence the person to imprisonment for life…'[3]

[12] The test on appeal is whether the court *a quo* misdirected itself by the sentence it imposed or if there is a disparity between the trial court's sentence and the punishment an appellate court would have imposed. Further, can the sentence imposed appropriately assessed be described as shockingly, startling or disturbingly

[3] Section 51 (1) of the Criminal Law Amendment Act, 105 of 1997.

inappropriate.[4] It is trite law that in sentencing, the punishment should fit the crime and the offender, be fair to society and the offender, and be blended with mercy.[5]

[13] The appellant submits that the cumulative effect of the factors listed above should have been regarded as substantial and compelling sufficient to deviate from the prescribed minimum sentence. In addition the appellant contends that the fact that he was assaulted after the commission of his crimes and lost sight in his eye and this is in itself a mitigating factor. I do not agree. This may be a factor to be considered should the appellant be considered for parole.

[14] A court of appeal is enjoined to consider all other circumstances bearing down on this question to properly assess the trial court's finding and determine the proportionality of the sentences imposed upon the offender. An appeal court's discretion to interfere with a sentence may be exercised only: (a) when there has been an irregularity that results in a failure of justice; (b) or when the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated, or (c) when the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[15] The court of the first instance superficially considered the mitigating and the aggravating factors in connection with the offences committed and referred to these in the judgment on sentence. Significantly, no probation officer's report was submitted to the judicial officer in connection with the alleged disabilities suffered by the appellant. This is regrettable.

[16] It is indeed so that the complainants only sustained minor injuries. However, physical injuries are very different from emotional and psychological injuries. By contrast, what is of importance is that these crimes were perpetrated against two (2) young women. Crimes in general, but especially against women, offend against the

[4] *S v Van De Venter* 2011 (1) SACR 238 (SCA) at para [14].
[5] *S v Rabie* 1975(4) 855 (AD) at 862 G.

aspirations and ethos of all South Africans. The victims, in this case, were soft targets for the appellant. The court of the first instance also emphasized that this type of crime was prevalent within its jurisdiction.

[17] In these peculiar circumstances, the sentence of life imprisonment imposed upon the appellant in connection with the crime of rape must reflect a censure to this conduct and behaviour. Not only do crimes against women in this country amount to a severe invasion of the dignity of the victims, but these crimes do not contribute to our claims that we live in a gender-equitable and just society.

[18] However, following section 73(1)(b) of the Correctional Services Act,[6], a person sentenced to life imprisonment theoretically remains in prison for the rest of his or her natural life. Life imprisonment, in practice, is regarded as a sentence of twenty-five (25) years of imprisonment. In this connection, the parole provisions that may become relevant are indicated as follows;

'…A person sentenced to life imprisonment may not be placed on parole until he or she has served at least twenty-five (25) years of the sentence; but such a prisoner may, on reaching the age of sixty-five (65) years, be placed on parole after he has served at least fifteen (15) years of the sentence…'[7]

[19] This, therefore, could mean that the practical effect of imposing a life term upon the offender, in this case, would only benefit the public's yearning for retribution, prevention and deterrence for this type of crime. I say this also because the offender has exhibited remorse for his actions. He showed remorse during the proceedings for his criminal behaviour.

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[6] Act 111 of 1998 (the Act)
[7] Section 73(6)(b)(iv) of the Act.

[20] After some anxious consideration, I indeed find some redeeming factors in favour of the appellant in mitigation of his sentence. I do not find only aggravating factors. He was undoubtedly from a difficult background. He is an elderly man with some significant disabilities and may be rehabilitated. He has already spent about thirty (30) months incarcerated as a pre-trial prisoner. When an offender has been incarcerated as an awaiting trial prisoner for an extended period, this may be considered when an appropriate sentence is imposed. On a strict interpretation of the law, this does not itself amount to a substantive and compelling circumstance.

[21] That being said, nothing prevents this court from considering the period that the offender has been incarcerated, pending his or her trial, when imposing the appropriate sentence. However, this does not apply mechanically through an arithmetic calculation.

[22] A court is expected to depart from the prescribed minimum sentence regime if it can find and identify substantial and compelling circumstances to justify such a departure to the benefit of the appellant. In addition, it is obliged to keep in mind that a specified sentence has been prescribed by law as the sentence that should be regarded as ordinarily appropriate in these circumstances.

[23] Undoubtedly, some facts and factors constitute substantial and compelling circumstances to the appellant's benefit. This is even when objectively evaluated against how the crimes were committed or why these crimes were committed. I find favour with the submissions advanced on behalf of the respondent to the effect that public interest must also be appropriately served in the appellant's sentencing, taking into account the nature of the crimes and the effects upon these young complainants. Deterrence and retribution often tend to steer the severity of the proposed sentence in a specific direction. Rehabilitation, on the other hand, tends to pull the proposed sentence in yet another direction. To focus on rehabilitation in this case, in my view, would not lead to an unfair and inappropriate sentence, which will be disproportionate to that deserved by the appellant for the crimes upon which he stands convicted.

[24] This crime has an element of gender-based violence which in our country has regrettably reached pandemic proportions. I believe an unambiguous message must be sent to offenders participating in this type of crime. The respondent's counsel wisely conceded that life imprisonment was not the only appropriate sentence for the appellant in this case.

[25] In my view, the court of the first instance did not give enough weight to the appellant's circumstances and the issue of his possible rehabilitation. This is why I say that the lower court erred when imposing the sentence of life imprisonment upon the appellant. I say this also because the lower court lacked sufficient information to give the appropriate weight to any of the personal factors and circumstances of the appellant. Also, the appellant did show genuine remorse. Undoubtedly, the circumstances of this case demand that the appellant, for all practical purposes, be incarcerated for an extended period.

[26] However, as alluded to previously, focusing on rehabilitation would not lead to an unfair and inappropriate sentence, which will not be disproportionate to that deserved by the appellant for the crimes upon which he stands convicted. Finally, the imposition of a life sentence upon the appellant was unjust and disproportionate, considering the circumstances surrounding the commission of the offences.

Order:

[27] In conclusion, an order is issued in the following terms, namely that:

1. The appeal on sentence is upheld.

2. The sentence of life imprisonment is set aside.

3. The appellant's convictions are confirmed

4. The appellant is sentenced to twenty (20) years of direct imprisonment.

5. The sentence imposed in paragraph four (4) above is ordered to run with effect from 7 July 2022.

6. The remaining directions that the appellant's name was recorded in the official register for sex offenders and that he was declared unfit to possess a firearm are confirmed.

(In summary, the offender is sentenced to twenty (20) years of direct imprisonment)

WILLE, J

I agree:

THULARE, J

THULARE, J:

[28] I agree with Wille J and in the interests of justice, wish to make a few comments. It is necessary to begin and stress what was said in *R v Mzwakala* 1957 (4) SA 273 (AD) at 279F:

"It is not necessary to refer again to the various factors that have already been mentioned. There is no doubt that the crimes were very serious ones indeed and I should not wish the view to be entertained that this Court regards them in any other light. … But it is nevertheless in my opinion our duty, for the reasons stated, to reduce the penalty imposed by the trial Judge."

[29] Knowledge of the personal circumstances of a convicted person, for purposes of sentence is an indispensable tool to measure sentencing [*S v Quandu en Andere 1*1989 (1) SA 517 (AA) at 522E]. Every sentence should be considered in the light of the

accused's person and particular circumstances [*S v Matoma* 1981 (3) SA 838 (A) at 843A]. The appellant was 60 years of age at the time of his sentencing. He was already in the veranda and in the shade although not inside the older person's infrastructure. Females are older persons at 60 whilst males are older persons at 65 in terms of the Older Persons' Act, 2006 (Act No. 13 of 2006). He had what remained as an unexplained condition of his legs. He used crutches for mobility. The nature and extent of his disability is unknown. What we know is that it was serious enough for the State to take responsibility of his welfare and not expect him to be economically active to earn a living as he was a recipient of a disability grant. He suffered from epilepsy, which is accepted to be a central nervous system or neurological disorder which affects brain activity and caused seizures, periods of unusual behaviour and often loss of awareness. We also know that he was on medication.

[30] All these facts were compelling for the presiding sentencing officer to call for a probation officer's report in getting to know the appellant. Presiding Officers should make use of probation officers' reports for them to get to know an accused person, especially where there are above average personal circumstances like age, health and welfare. The failure of the presiding sentencing officer to objectively research and appropriately consider the personal circumstances of the appellant, were contributory factors to a disturbingly inappropriate sentence.

[31] Section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) provides for a sentence to imprisonment for life, for a person convicted of the offences for which the appellant was convicted. The Correctional Services Act, 1998 (Act No. 111 of 1998) provides guidance of what our nation regards as an exceptionally long period which a person sentenced to life may serve before consideration of parole. For others the period is 25 years. However, for persons reaching the age of sixty five years, which is the age that the appellant would reach within five years of the date of his sentencing, the longest period is 15 years [section 71(6)(b)(iv) of the Correctional Services Act]. This distinction is not without significance.

[32] The underlying thinking behind the differential treatment of older persons from others, can be traced back to the policy position of the Republic on older persons as reflected in specific legislation that was intended to deal effectively with the plight of older persons by establishing a framework aimed at the empowerment and protection of older persons and at the promotion and maintenance of their status, rights, well-being, safety and security; and to provide for matters connected therewith. The provisions of the Act do not exclude those convicted of serious crimes and applies equally to them.

[33] Section 2 of the Older Persons' Act, 2006, provides for its objects. Section 2(c) reads:
"2 Objects of the Act

(c) shift the emphasis from institutional care to community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible;"

Section 5 deals with the general principles of the Act and section 5(2)(a)-(c) reads:

"5 General Principles

(2) All proceedings, actions or decisions in a matter concerning an older person must-

(a) respect, protect, promote and fulfil the older person's rights, the best interests of the older person and the rights and principles set out in this Act, subject to any lawful limitation;

(b) respect the older person's inherent dignity;

(c) treat the older person fairly and equitably;

Section 7 deals with the rights of older persons and 7 reads:

“7 Rights of older persons

Older persons enjoy the rights contemplated in section 9 of the Constitution of the Republic of South Africa and in particular may not be unfairly denied the right to-

(a) participate in community life in any position appropriate to his or her interests and capabilities;

(b) participate in inter-generational programmes;

(c) establish and participate in structures and associations for older persons;

(d) participate in activities that enhance his or her income-generating capacity;

(e) live in an environment catering for his or her changing capacities; and

(f) access opportunities that promote his or her optimal level of social, physical, mental and emotional well being.”

And lastly, section 9 deals with the guiding principles for the provision of services to older persons and section 9(a) -(c) reads:

“9 Guiding principles for provision of services

Any service must be provided in an environment that-

(a) recognises the social, cultural and economic contribution of older persons;

(b) promotes participation of older persons in decision-making processes at all levels;

(c) recognises the multi-dimensional needs of older persons and therefore promotes inter-sectoral collaboration;"

[34] In *S v Matoma* 1981 (3) SA 838 (AA) at 842H it was said:

"By ontleding van die verhoorhof se benadering wil dit egter blyk dat daar in die besondere omstandighede oorbeklemtoning van die algemene belang ten koste van die appellant se persoonlike omstandighede geskied het. Die geleidelike en geregverdigde verswaring van strawwe om die vermeerderende voorkoms van n' bepaalde misdaad met afskrikking, retribusie en verwydering van die oortreder uit die gemeenskap in die belang van die gemeenskap te bekamp, moet by straftoemeting nie lei tot n' noodwendige negering van n' besondere beskuldigde se eie persoonlike omstandighede wat moontlik tot straf-vermindering kan lei nie. Elke geval moet nog steeds in die lig van die beskuldigde se persoon en besondere omstandighede opgeweeg word."

In *S v Mbingo* 1984 (1) SA 552 (AD) at 555F-G it was said:

"In considering whether a sentence is so severe as to warrant alteration, one must bear in mind that the trial court is not only better able to assess the probable effect of the sentence on the accused, but is also in closer touch with the community which the trial court serves, and has a more intimate awareness of its requirements."

[35] In the matter before us, the trial court denied itself the opportunity to know the appellant better, and to learn from experts on the effects of the psycho-social position of the appellant and its relation to the community which the trial court served. By its own design, the trial court removed itself from the appellant and his circumstances, including

the community of correctional services and the resources of correctional services to an elder, suffering seizures, with vision in one eye, with physical disabilities, on crutches and on medication. The magistrate attached insufficient weight to the personal circumstances of the appellant. It is worrisome that the magistrate was dismissive of the appellant indicating very early in the matter, his intention to plead guilty, and that a considerable amount of time passed before the State accepted his plea. It follows that the sentence imposed by the magistrate must be set aside and an order which will do proper justice to the appellant be made [*S v Reay* 1987 (1) SA 873 (AD) at 878A].

THULARE, J