



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A38/2022

In the Appeal between:

PATRICK MASHIBINI
and
THE STATE

Appellant

Respondent

CORAM: DANISO, J *et* KHOOE, AJ

HEARD ON: 29 AUGUST 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by way of email

and by release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 09 March 2023.

- [1] The appellant and his co-accused appeared in the regional court Botshabelo where they were indicted on two counts namely, murder and rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The charges arose from the incident which took place on 14 August 2014, it was the State's case that the accused ganged raped a 15-year-old girl, killed her by stabbing her over 18 times and thereafter drowned her by throwing her into the river.
- [2] On 24 October 2017 the State provisionally withdrew the charges against the appellant's co-accused. The appellant who had been legally represented was convicted after he had pleaded not guilty to both charges. He was subsequently sentenced to life imprisonment on each count the court having found no substantial and compelling circumstances warranting a deviation from the minimum sentence prescribed in terms of section 51(1) of the Criminal Law Amendment Act¹ ("the CLAA").
- [3] This appeal lies against the sentence and it is premised on the grounds that the sentence imposed for the respective counts is strikingly inappropriate and that the trial court erred in its finding that there were no substantial and compelling circumstances warranting a deviation from the prescribed sentence of life imprisonment.
- [4] In the heads of argument, a further ground of appeal is raised and it is directed at the irregularity of the proceedings. It is the appellant's case that in sentencing the appellant, the trial court erred by invoking the provisions of s51(1) of the CLAA while the offences the appellant was charged with were read in terms of the provisions of s51(2).

¹ Act No, 105 of 1997.

[5] It is common cause that reference is made to s51(2) in the charge sheets and when the charges were put to the appellant by the State. It is in that regard that the appeal is also supported by the State.

[6] It is tested law that sentencing is pre-eminently the prerogative of the trial court. A court of appeal is not entitled to not to erode this discretion and alter the sentence imposed by a lower court unless satisfied that the proceedings were marred by irregularities resulting in the failure of justice or that the trial court misdirected itself in that, the sentence imposed is so disproportionate or shocking that no court could have imposed it.² I am not so satisfied.

[7] In the record of the proceedings, the facts upon which the conviction and sentence are based were generally of common cause³ namely that:

7.1. It was around 11h00 on 14 August 2014 when the appellant and his accomplice accosted the deceased in the field. After asking her where she was going, the appellant's accomplice produced a knife. The deceased was forced at knifepoint to walk towards a river where the appellant and his accomplice took turns raping and stabbing her several times. The deceased was thereafter thrown into the river whilst still alive. She ultimately drowned.

7.2. The post-mortem report handed in by concurrence of both the defence and the State as Exhibit "C" indicates that the deceased sustained at least 18 stab wounds mainly located at her vital organs, the neck, chest and head area. She was 15 years and some few months old.

[8] In terms of s51(1) read with Part 1, Schedule 2 of the CLAA, murder in the circumstances where the victim was killed after being raped attracts a minimum sentence of life imprisonment unless the court found substantial

² *S v Rabie* **1975 (4) 855** (A) at 857D-E; *S v Bogaards* **2013 (1) SACR** (CC) at para 41.

³ In the appellant's plea explanation and statement in terms of s115 and s220 respectively, of the Criminal Procedure Act 51 of 1977, the manner in which the deceased was raped and murdered is not disputed.

and compelling circumstances which justified a less severe sentence. Similarly, gang rape that is, where the rape is perpetrated by more than one person, the minimum sentence of life imprisonment is applicable including the rape where the victim is under the age of 16.

- [9] The appellant contends that his personal circumstances should have been considered as substantial and compelling circumstances warranting a deviation from the prescribed minimum sentences namely: his age of 19 years at the time of the incident; that he has a four year old daughter who lived with its mother; he lived at home with his mother and siblings; he was employed as a bricklayer earning about R3000.00 per month; he was a first offender; he handed himself to the police after the crime and that he had been in custody awaiting trial for about a year and two months therefore, the trial court should have imposed a lesser sentence in that regard.
- [10] The learned magistrate's judgment on sentence⁴ meticulously considered the appellant's personal particulars including the fact that he has been incarcerated pending trial and that he had regretted his actions which spurred him to hand himself to the police and having done so, she weighed these factors against the gravity and the brutality of the crimes the appellant has been convicted of and found that they were insignificant to warrant a lesser sentence.
- [11] I am in agreement with the magistrate's conclusions. The traditional mitigating factors such as the appellant's personal circumstances cumulatively, can be taken into account as factors to be considered as substantial and compelling circumstances however, they must be weighed against the aggravating factors as on their own they are immaterial thus do not justify a lesser sentence.⁵

⁴ Record page 11/ 14-25; page 12/ 1-19.

⁵ *Vilakazi v The State* (576/07) [2008] ZASCA 87 (2 September 2008) at paragraph 58 quoting: *S v Malgas* 2001 (1) SACR 469 (SCA).

- [12] The facts of this matter demonstrate the pervasive sense of entitlement some men believe they have over women's bodies and also their lives. 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. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."*⁶
- [13] In this matter, the deceased was a defenceless young girl. The appellant and his accomplice were so brazen that they attacked the deceased in broad daylight.
- [14] In addition to the degradation of being ganged raped, the deceased was brutally killed. The stab wounds that she sustained indicate an overkill and just for the certainty of her demise, the appellant and his accomplice threw her into the river where she ultimately drowned.
- [15] The appellant's regret does not without more, translate to genuine remorse⁷ for the reason that, he tried to recant the confession that he made before the magistrate and at the trial, he also attempted to downplay his role by shifting the blame to his accomplice. It has been said that without remorse chances of an offender rehabilitating are very slim. An offender who does not accept what he did wrong will not genuinely take steps to remedy his actions.
- [16] I am not suggesting vengeance or that the appellant should be sacrificed at the altar of deterrence but to rather re-affirm the trite legal principle that

⁶ *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paras 3-4.

⁷ *S v Matyityi* 2011 (1) SACR 40 (SCA), para 13.

sentences that courts impose must be individualised and reflect the gravity of the offence committed and also have an element that speaks to the plight of the society.

- [17] In *S v Mhlakaza and Another* **1997 (1) SACR 515** (SCA) at 519d-e the following is stated:

"Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence."

- [18] For the reasons that I have set out above, I hold that the sentence imposed is appropriate in these circumstances.

- [19] With regard to the irregularity of the proceedings, I am of the view that there is no merit to the appellant's contention that because he was "charged" with murder and rape read with the provisions of section 51(2) his rights to a fair trial which includes the ability to answer to the charges as provided for in section 35(3) of the Constitution Act⁸ were infringed when the court invoked the provisions of s51(1) at the sentencing stage.

- [20] The issue of whether it is appropriate to apply the provisions of section 51(1) during sentencing in the circumstances where the charge sheet made no reference to section 51(1) was clarified by the Supreme Court of Appeal in *S v Kekana*,⁹ therein it is explained that:

"[22] ...the provisions of the CLAA do not create different or new offences, but are relevant to sentence. Thus, murder remains murder, as a substantive charge, irrespective of whether s 51(1) or s 51(2) applies. Simply put, there is no such charge as 'murder in terms of s 51(1) or s 51(2)."

⁸ Act No, 108 of 1996.

⁹ **2019 (1) SACR 1** SCA at para 22.

[23] As Cameron JA explained in *S v Legoa* 2003 (1) SACR 13 (SCA) ([2002] 4 All SA 373; [2002] ZASCA 122) para 18, with reference to Rumpff CJ's observations in *S v Moloto* 1982 (1) SA 844 (A) at 850C – D:

'It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus, "robbery with aggravating circumstances" is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present. (As pointed out earlier, it is different when the element specified in the Schedule relates not to the offence, but to the person of the accused, such as rape when committed (iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions.)'

[21] On the available facts the appellant was convicted of the offences which fall within the purview of s51(1) read with Part 1 of schedule 2. The erroneous reference to s51(2) or the magistrate's omission to specifically refer to s51(1) does not amount to an irregularity vitiating the proceedings. "*The matter is one of substance and not form, and a general rule could not be laid down that the charge sheet in every case had to recite either the specific form of the scheduled offence with which the accused was charged, or the facts the state intended to prove to establish it.*" *S v Legoa* 2003 (1) SACR 13 SCA [2002] ZASCA 122 para 21.

[22] It is also clear from the record¹⁰ that the appellant was properly appraised of the particulars of the crimes with which he had been charged with and was able to respond thereto. Prior to pleading to the charges, the magistrate directed the following enquiries to the appellant's legal representative:

COURT: Alright. As both charges attract the Criminal Law Amendment Act 105/1997, have the consequences thereof been explained to your client?

¹⁰ Record page 2/ 10-15.

MISS DICK DICK: It is so Your Worship.

COURT: He understood?

MISS DICK DICK: He did.

[23] In conclusion, the facts of this matter and the submissions made, do not justify an interference with the trial court's sentencing discretion.

[24] The following order is issued:

- (1) Condonation for the late noting of the appeal is granted.
- (2) The appeal against sentence is dismissed.

I agree

NS DANISO, J

NJ KHOOE, AJ

On behalf of Appellant:

Mr Van der Merwe

Instructed by:

Legal Aid South Africa

BLOEMFONTEIN

On behalf of respondent:

Adv. B J Classens

Instructed by:

The Director of Public Prosecutions

BLOEMFONTEIN