REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

A684/16

CASE NO: ~~A412~~/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

23/02/2018

In the matter between:

GIVEN NGOBENI **APPELANT**

and

THE STATE **RESPONDENT**

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] The appellant was convicted of two charges in the regional division, Mpumalanga. The two convictions emanate, respectively, from two allegations of rape of a 14 year old girl and a 37 year old woman. The incidents happened seven months apart, that is, on 18 July 2014 and 7 December 2014. The appellant initially faced a third count of assault with intent to do grievous bodily harm committed against the complainant in count 2. He was acquitted on that count at the end of the trial as his actions were found to have emanated from the rape in count 2. The appellant was legally represented throughout the trial.

[2] The appellant pleaded not guilty on all counts but was convicted as charged on count 1 and 2. He was as a result sentenced to life imprisonment for the rape in count 1 and ten years imprisonment for the rape in count 2. The trial court made further orders: in terms of s 39 (2) *(a)* (i) of the Correctional Services Act 111 of 1998 subjecting the two sentences to the authority of the Commissioner; s 103 of the Firearms Control Act 60 of 2000 declaring the appellant unfit to possess a firearm; s 50 of the Criminal Law Amendment Act 32 of 2007 placing the appellant's particulars on the National Register of Sex Offenders.

[3] In terms of s 309 (1) *(a)* of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act") the appellant has an automatic right of appeal against the sentence of life imprisonment imposed in respect of the conviction in count 1. He is before us having exercised that right appealing the sentence only.

BACKGROUND

[4] The complainant in count 1 is the step daughter of the appellant. Her story is that on the day in question the appellant raped her by inserting his penis into her anus whilst she was there to visit her mother. The appellant's mother, who was in the house preparing food at the time, saw the complainant leave the appellant's bedroom just after the time the appellant allegedly raped her. The appellant's mother testified to this effect, but could not

testify as to whether the rape took place or not. After leaving the appellant's bedroom, the complainant is said to have been agitated and crying and refused to eat. She went to the bedroom of the appellant's grandmother to sleep. During the night the complainant phoned the police and reported the rape and the appellant was subsequently arrested.

[5] In count 2, the complainant is the wife of the appellant's uncle, that is, the uncle is the brother to the appellant's mother. The complainant testified that on the day in question it was at night and she was in a pit latrine outside her home when she was confronted by the appellant. The appellant assaulted her and raped her from behind. When the appellant released her she ran, half naked, to her place which was nearby, and reported the rape to her children. The appellant's DNA was found in the semen samples taken from the inside of the complainant's private parts.

THE GROUNDS OF APPEAL

[6] The grounds of appeal are summarised in the appellant's heads of argument being, firstly, that the sentence of life imprisonment does not show mercy to the appellant and renders the sentence unnecessarily harsh and inappropriate. Secondly, that the trial court erred in not finding any substantial and compelling circumstances that justifies a lesser sentence than that of the minimum sentence. The submission is that the following circumstances, taken together and seen as a whole, constitutes substantial and compelling circumstances, that is: the age of the appellant and the fact that he was a first offender and did not have any pending cases against him; the period of two years the appellant spent in custody awaiting trial; the remorse he showed during the sentencing proceedings; he was self-employed prior to his arrest earning about R2 600 *per* month by cutting grass and working as a painter; he is not married but has a child of 7 years; and the fact that he suffers from a mental illness which he sustained in a motor vehicle accident.

DIMINISHED CRIMINAL RESPONSIBILITY

[7] Before us, however, what was argued on behalf of the appellant was the failure by the trial court to attach enough weight to a possible mental condition/illness or brain injury of the appellant for the purposes of sentence. The contention is that the trial court ought to have requested further evidence/information in that regard and as such canvassed the possibility that the appellant suffers from a mental condition and thus lacked insight into offences committed. Clarification in that regard, so it is argued, called for expert witness evidence or a referral in terms of s 77 and 78 of the Criminal Procedure Act. The trial court is said to have not canvassed why the prosecutor inferred that the appellant thought the proceedings was a joke. In this regard we were referred to a judgment in *S v Opperman and Another* [1] in regard to the application of the minimum sentence where lack of insight is at issue.

The Law Applicable

[8] A person has diminished criminal responsibility if it is found that at the time of the commission of the act in question she/he was criminally responsible but her/his capacity to appreciate the wrongfulness of the act or to act in accordance with the appreciation of the wrongfulness of the act was diminished by reason of pathological or non-pathological factors.[2]

[9] A variety of factors may affect the offender's emotions and mental health to such an extent that her criminal responsibility may be diminished. These are factors like mental illness, provocation, jealousy, severe emotional stress or even intoxication. When a court finds that any of those factors have substantially reduced the offender's power of restraint and self-control, the factor becomes highly relevant for sentence.[3]

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[1] 2010 (2) SACR 248 (SCA).
[2] See S v Shapiro 1994 (1) SACR 112 (A) at 120d – f.
[3] See SS Terblanche: A Guide to Sentencing in South Africa 3ed p224 to 225 and the cases quoted thereat.

Analysis

[10] In my view, findings of diminished criminal responsibility must be established within the factual matrix of the finding of guilt. This is so because such findings affect the moral blameworthiness of the offender. Where the issue comes up after conviction, it does not form part of the factual matrix relating to the conduct of the offender and does not reflect in what manner it would have affected her/his moral blameworthiness. The issue can, therefore, not be entertained at this late stage of the proceedings.

[11] It is common cause that, in this instance, the issue of diminished criminal responsibility was raised only at the sentencing stage when the appellant, whilst testifying in mitigation of sentence, stated that he was 'once sick mentally' as a result of a motor vehicle accident and that he had been on medication before his arrest. It does not appear from the record that the appellant's legal representative was aware of this factor. It was never raised as a defence nor was it ever mentioned during the trial that the appellant has a mental illness.

[12] As in this instance, in *Opperman*, the appellants relied on diminished criminal capacity due to pathological reasons (that is, mental illness). What, however, differentiates the two cases from each other is that in *Opperman* the findings of diminished criminal responsibility were made by the trial court at the end of trial but before sentence. The findings were based on the factual matrix of the findings of guilt. Whilst the appellants were found to have acted wrongfully, their knowledge of wrongfulness could not be matched to their insight into the seriousness of the offences they committed. The appeal court made a finding, as well, that a reading of the appellants' oral testimony confirmed that the appellants were not at the intellectual level of normal men in their late twenties. In this instance, however, no findings of mental illness were made at the time of conviction the issue came up at sentencing stage.

[13] Even if it can be said that the findings of diminished criminal responsibility can still be made during sentencing, the matter before us would not qualify for the following reasons:

13.1 Firstly, there must be a connection between the factor that caused the diminished responsibility and the commission of the offence.[4] From the reading of the record, there is no evidence that indicate the connection between the appellant's alleged mental illness and the commission of the offences he is convicted of. I say so because when giving evidence in mitigation of sentence the appellant was asked by the court whether the accident caused epilepsy or 'what mental illness', his response was that when he converses with a person he loses his temper very easily and becomes angry. This cannot be said to have any connection with the offences of rape he committed. I do not believe that when he raped the complainants he had lost his temper, became angry and ended raping them. It does not support the appellant's submission on behalf of the appellant that he lacked insight into the offences. The trial court is correct to have made a finding that the appellant indicated anger problems which are not regarded as mental illness.

13.2 Secondly, from my reading of the oral evidence of the appellant on record there is no sufficient factual foundation to support a finding that the appellant acted with diminished criminal responsibility when he committed the offences. The comments which are raised by the appellant in the heads of argument made by the prosecutor and the trial court during trial, do not in my view raise the reasonable possibility that the appellant was acting completely irrationally and that his actions are the product of mental illness. For example, the comments by the prosecutor that the appellant was taking the proceedings as a joke do not have any relevance to his mental status they were aptly said in response to his request that he be allowed to go back to the witness stand and apologise to the complainants.

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[4] See S v Mathee 1992 (1) SACR 186 (A) at 197e.

13.3 Lastly, there was no obligation on the trial court to make an order calling for experts' reports to verify the veracity of the appellant's allegations of mental illness. Whether the accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. The accused's *ipse dixit* may suffice as well, provided that a proper factual foundation is laid which gives rise to reasonable possibility that he so acted.[5] Thus, the failure by the trial court to order experts' reports in the circumstances of this case does not take the appellant's case any further. The prosecutor did cross-examine the appellant on this issue and the trial court itself, also sought more information from the appellant. Based on the appellant's *ipse dixit* and the further information extrapolated from the appellant, the trial court concluded that the appellant had an anger problem rather than a mental illness. The trial court was entitled, therefore, to decide on the appellant's *ipse dixit*, as it did.

APPROPRIATE SENTENCE

[14] In order to impose a sentence incorporating the objectives of punishment, the trial court considered the nature and seriousness of the offences, the appellant's personal circumstances and the interest of society.

[15] The most important features of the appellant's personal circumstances included the fact that he was 27 years at the time of sentencing with no previous convictions, he had one child of 7 years living with the mother who is the child's primary care-giver; the child receives a social grant; he was employed prior to his arrest and spent two years in custody awaiting trial. He did not show remorse.

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[5] See D Mnisi v The State (391/2008) [2009] ZASCA 17 (19 March 2009) para 5.

[16] When considering the nature and gravity of the offence, the trial court took into account the following factors: the close relationship between the appellant and the complainant – the complainant was his step daughter; the trauma experienced by the complainant – she was distressed and had to phone the police in the middle of the night; the seriousness of the injuries; and the prevalence of the offence of rape within the family set up. The trial court also considered the interest of society in the sense of protection of young, vulnerable and trusting persons like the complainant against persons like the appellant.

[17] The prescribed minimum sentence is, in this instance, applicable unless there are substantial and compelling circumstances. It is common cause that the complainant was a child under 16 years of age at the time she was raped, thus, s 51 (1) of the Criminal Law Amendment Act 105 of 1997 read with Schedule 2 which calls for life imprisonment is applicable. Having considered all the traditional factors of sentencing, the trial court found no substantial and compelling circumstances and imposed a sentence of life imprisonment.

[18] The trial court was correct to have found no substantial and compelling circumstances. The personal circumstances of the appellant are overshadowed by the seriousness of the injuries sustained by the complainant – a young girl of only 14 years. The undisputed evidence of the doctor who examined the complainant after the rape is that the complainant discharged blood from the anus with bruising, swelling and multiple fissures around the anal orifice with tweaking and a loss of tonicity due to repeated forced penetration of a blunt object. The child's vagina discharged faeces due to perforation of the wall between the vaginal and anal canals. Tweaking happens when the anus is touched with a finger without the contraction of the anus and sphincter. Under normal circumstances when you touch the anal sphincter it contracts. The sphincter was very loose. The hypo tenacity of the tone/sphincter grip is normally lost if there is an object which forcefully penetrated the anus, it loses its tonicity. The complainant was referred to a gynaecologist because of the perforation. It was said that such a wound can sometimes heal on itself if it

is not a big hole. Unfortunately, no report from the gynaecologist was received to determine the extent of the injuries, but the severity of the injuries cannot be ignored.

[19] The trial court was as a result correct to have imposed a sentence of life imprisonment in the circumstances of this matter. The injuries sustained are horrendous and calls for a very grave punishment. The sentence of life imprisonment meted by the trial court is to me appropriate. Any other sentence would to my mind overemphasise the appellant's personal circumstances whilst underemphasising the seriousness of the offence. To elevate the personal circumstances of the appellant above the interest of society in general and the complainant's in particular, would not serve the well-established aims of sentencing.[6]

[20] That the sentence imposed does not show mercy to the appellant is out of question in the circumstances of this matter. Whilst mercy could find a place in almost all cases but misplaced sympathy must be avoided and an appropriate sentence be determined. [7] The sentence in this instance is appropriate, it fits the offence and the offender and it is in the interest of society.

ORDER

[21] In the circumstances the appeal is dismissed.

E. M. KUBUSHI,

JUDGE OF THE HIGH COURT

[6] See S v RO 2010 (2) SACR 248 (SCA) para 20.
[7] See S v RO above para 40 -42.

I concur

V.T. MTATI

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	Adv: J HENZEN-DU TOIT
	Instructed by:
	PRETORIA JUSTICE CENTRE
	2nd Floor FNB Building
	206 Church Street
	PRETORIA 0001
On behalf of the respondent:	Adv: M.J. NETHONONDA
	Instructed by:
	DIRECTOR OF PUBLIC PROSECUTIONS
	Presidential Building
	28 Church Square
	PRETORIA 0001