IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION,PRETORIA)

CASE NUMBER: A687/2016

2/5/2018

In the matter between:

MZWAKHE ANDILE MVUYANE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The appellant appeared before the Regional Magistrate sitting at Sebokeng on two charges of rape. The complainant in Count 1 was a fourteen year old Ms N C She was raped by the appellant and his accomplice one Bongani Sithole on 26 July 2005. The complainant in Count 2 was one Ms M T and this incident occurred on 28 July 2005.

The appellant was convicted on both counts and sentenced to life imprisonment in respect of count 1 and to 10 years imprisonment in respect of count 2. The appellant was, on petition, only granted leave to appeal the sentence in respect of count 1.

BACKGROUND

[2] The complainant was accosted by the appellant and his friend Bongani Sithole. She was on her way to make a call to a friend to discuss their English paper. They grabbed her and one of them threatened her with a knife. She described one of them as being dark in complexion and the other one light in complexion. The light in complexion one was her brother's friend, he used to visit her home and she had known him for about a year and knew where he lived. She was taken to a house belonging to the dark in complexion one. The house consisted of one room divided into a kitchen and a bedroom.

[3] She was instructed to undress and they took turns in raping her, each one on two occasions. Thereafter they made her sleep between them. She did not know if they used condoms during the rapes but she heard the dark in complexion one asking his companion where the condoms were, and both searched for the condoms in the house. Her assailants left the house in the morning. After she left the house she met her mother in the street and she reported the rapes to her. The complainant‘s mother testified and she corroborated the complainant's version. The complainant's mother did not know the appellant and she had never seen him at her home and the reason being that she was employed and was usually away from home.

[4] Bongani Sithole was initially the appellant's co-accused. His trial had been finalised first as a separation of trials had been ordered after the appellant's failure to attend court. Bongani was called as a witness. He was serving a term of imprisonment for the rape of the Complainant. He testified that he did not know that the appellant and the complainant's brother were friends. Prior to the incident taking place, he had consumed alcohol and had taken drugs. He testified that the complainant was his girlfriend and that the appellant was present at his house during the incident. When he was having sexual intercourse with the complainant, the appellant sat in the kitchen. He was later awoken by the complainant’s screams and he saw the appellant having sexual intercourse with her. He tried to reprimand the appellant but he had no energy because he was drunk. In the morning he and appellant tried to persuade the complainant not to lay criminal charges against the appellant. The appellant later requested him to

leave so that he could discuss the subject with the complainant and he left for Palm Springs.

[5] The appellant testified that the complainant had a relationship with Bongani and he had introduced them to one another. On the day of the incident he left them at complainant's home and he later met up with them at Bongani's house. He denied raping the complainant. He slept in the kitchen and when he awoke in the morning Bongani had already left. He accompanied the complainant to her home.

GROUNDS OF APPEAL

[6] The appellant appeals his sentence on grounds that life imprisonment was strikingly inappropriate and harsh and that a shorter term of imprisonment should have been imposed. Furthermore, that the court a *quo* should have considered the cumulative effect of the following factors (a) the absence of a previous conviction, (b) the absence of planning (c) the age and personal circumstances of the appellant (d) that he could be rehabilitated(e) the fact that he had argued with Bongani about allowing the complainant to go home.

[7] Counsel for the appellant included in his Heads of Argument that, besides the recorded personal circumstances of the appellant, there **was a** lack of sufficient factors available to the court during sentencing in order to enable it to exercise its discretion during sentencing judicially. While he conceded that he did not foresee a different sentence being imposed he submitted that the sentence be set aside in order to allow a social workers report to be presented to the court.

THE LAW

[8] Counsel for the respondent filed two sets of Heads of Argument during May and September of 2017. The first dealt with sentence only and the second dealt with the appellants automatic right to appeal conviction and sentence. The Magistrate too had advised the appellant of such rights. In the unreported judgment of *Matsheng Jacob Chake v The State, case* number 205/2013, the Supreme Court of Appeal approved and confirmed the judgement in S *v Alam*

2011 (2) SACR 553 (WC), which held that from 1 April 201O section 309(1)(a) was amended by section 84 read with section 99(1) of Schedule 4 of the Child Justice Act 75 of 2008. The effect of the amendment was to repeal the automatic right of appeal of an offender sentenced to life imprisonment by a Regional Court under section 51(1) of Act 105 of 1997. The appellant was convicted on 27 July 2010 and as already indicated, leave to appeal sentence only was granted on petition.

[9] Counsel for the appellant argued that the trial court failed to carry out its duty in that not sufficient evidence was placed before the court to enable it to exercise its discretion judicially. On the other hand counsel for the respondent argued that the trial court enjoyed unfettered discretion in sentencing. Aggravating circumstances existed, the seriousness of the offence, the prevalence thereof in society and the fact that the complainant was very young when the incident occurred, were factors to be considered in consideration of an appropriate sentence. Furthermore, he contended that the appellant had not shown any remorse.

[10] It is trite that the function of sentencing falls pre-eminently within the discretion of the trial court and that a court of appeal would only interfere if there was a material misdirection or irregularity which vitiated the exercise of the courts sentencing discretion. (S *v Rabie 1975 (4)* SA *855 A).* In as much as this trite principle was recognized in S *v Malgas 2001 (2) SA 1222 (SCA)* a different approach was addressed and called for when dealing with the prescribed sentences. In S *v GK* Case number: A05/ 2013 (WCHC) at paragraph 5 the subject of sentencing patterns stated in paragraph 12 of *Ma/gas supra,* was discussed and the following was stated:

> *"...Marais JA was not in this part of the judgment describing the approach which an appellate court must adopt in assessing* a *sentencing court's finding as to the presence or absence of substantial and compelling circumstances. What he was dealing with was an argument that the appropriated test for the sentencing court itself to apply in determining whether substantial and compelling circumstances are present is to ask whether the prescribed sentence is one which it would have interfered with*

if it were hearing an appeal against sentence. In dealing with this argument Marais JA first described the conventional approach to appeals against sentence as a background but then went on to say that this is not an appropriate approach to test the presence or absence of substantial and compelling circumstances".

[11] While a trial court's sentencing discretion is wide, it is indirectly limited to a certain degree when it comes to its application of Act 105 of 1997, which Act has singled out in Schedule 2 serious offences to which severe sentences are to be imposed. In terms of this Act the imposition of the prescribed sentences may only be departed from on a finding by the trial court that substantial and compelling circumstances prevail and are such that they entitle the court to depart from such prescribed sentences. It is trite that the principles laid down in *Ma/gas supra* require court's to impose sentences in keeping with what the Legislature prescribed and not to depart from imposing such sentences for flimsy reasons.

[12] One of the cases relied upon by counsel for the appellant was that of *S v Mokgara* 2015 (1) SACR 634 (GP) where a 27 year old had raped a 7 year old grade 2 pupil, the court reiterated the obligation placed on a trial court to properly enquire into the facts of the case and circumstances that will place it in a proper position to evaluate the presence or not of substantial and compelling circumstances before imposing sentence. No evidence was adduced regarding 'the injuries, violence perpetrated and emotional trauma caused to the victim'. The conviction was confirmed and the sentence of life imprisonment was set aside and the matter was referred back for sentence to be considered afresh. The facts in this case are distinguishable.

[13] In *S v Van De Venter* 2011 (10 SACR 238 (SCA) the trial court ignored psychiatric evidence of a diminished moral responsibility and the appeal court reduced the sentence. In *S V Mtshali* 2012 (2) SACR 255 (KZN) the appellant had murdered her two minor children and there was evidence that she was severely depressed and emotional. It was held that a term of imprisonment not to be appropriate in the circumstances of the case.

[14] On a reading of the judgement in this matter on sentence, it is my view

that it is not very clear as to how the Learned Magistrate evaluated the evidence to deal with the exercise of a finding if substantial and compelling circumstances were present or not. The learned Magistrate could have called for further reports such as a victim impact report, and a pre- sentencing report on the circumstances of the appellant as recommended in *Mokgara supra.* The appellant did not testify in mitigation.

[15] In this instance the availability of a pre-sentencing report and victim assessment report could have been helpful if it were not for the following factors. Of importance to consider in these circumstances is that the offences were committed during 2005. The appellant's trial only commenced four years later during September 2008 and he was sentenced in July 2010. He launched his appeal during 2014 and the appeal was heard in 2017. It would be twelve years after the complainant suffered the rape and seven years after the appellant was sentenced. The complainant was 14 years old then and.is about 26 years old now. In *S v Mokgara* the periods were fairly close, the date of incident was in 2009 and the appeal was heard during 2014.

[16] It is my view that given the years that have gone by it would not serve the interests of justice to refer the matter back to the trial court to call for the necessary reports and to consider sentencing afresh. The question that needs to be asked is whether on the facts available, substantial and compelling factors exist which, when taking the cumulative factors in his personal circumstances, would justify the imposition of a lesser sentence alternatively whether life imprisonment would be disproportionate to the crime committed. For purposes of sentence the appellant cannot be considered as a lone offender, as was the case in *Van de Venter, Mtshali and Mokgara supra.* In *S v Smith* 2017(1)SACR 520 (WCD) Rogers J stated at paragraph 109:

> " Generally, one should strive to punish co-perpetrators equally unless there are circumstances justifying differential treatment. Justice must not only be seen to be done. The imposition of unequal sentences on equally guilty perpetrators violates one's sense of justice. This principle applies even where co-perpetrators have been tried separately."

Act 105 of 1997 specifically provides for punishment in instances of gang rape and for punishment where the victim was below 16 years of age.

[17] It is common cause that the appellant was 29 years when the incident took place; he was unmarried and unemployed and went up to grade 11 with his schooling. He was a first offender for purposes of the rape offence. He admitted to having a previous conviction of Housebreaking with Intent to steal and Theft which was committed after the offence in this matter was committed. He was sentenced to six years imprisonment. Another factor which needs mentioning is that two days after this incident the appellant was involved in another rape and this was heard together with this matter. Although these two matters are not relevant to the present one, for purpose of considering the duration of imprisonment, his conduct speaks to a question that needs to be addressed, which is whether the appellant could be rehabilitated. Although the appellant could be criticized for not testifying in mitigation, he was within his rights to refuse to do so. It did not appear from the evidence or during the accused's testimony that more than what was dealt with during mitigation could have been revealed about his personal circumstances and it is not suggested in this appeal that additional factors are available.

[18] In a number of cases life imprisonment was reduced because the rape was considered not to have been an 'extraneously violent one'. An aggravating factor in this matter what was that there was premeditation and also violence. The appellant and his co- perpetrator accosted the complainant, who was 14 years old and threatened her with a knife. At the time the appellant was not a stranger to the complainant, he was her brother's friend. She was held captive for the whole night. They took her against her will to a house, caused her spend the night sleeping in between them as they took turns, each raping her twice.

[19] There were two medical reports handed in during the trial. In the first medical examination done on 27 May 2005 the complainant reported that she was a virgin at the time of the incident. She testified that she sustained tears to

her vagina, she felt pain when urinating and she had difficulty walking properly and the medical examination confirmed injuries in the form of bruising. The second medical examination was conducted during August 2005 and it does not appear in the learned Magistrate's judgment what the relevance of admitting the second medical report was and there was no testimony regarding the relevance of the information contained therein. In my view, although the physical injuries were not serious, this case is not comparable to the other cases that dealt with one accused person. In this instance the seriousness is in the gang rape of a young girl in the circumstances in which it occurred. Although no evidence was led on the emotional state of the complainant this court would be correct in inferring that there was psychological trauma present. In light of the above I recommend that the appeal on sentence be dismissed.

[20] In the circumstance the following order is given:

[20.1] Appeal on sentence is dismissed.

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TLHAPI VV

(JUDGE OF THE HIGH COURT)

I agree,

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NGOBENI G

(ACTING JUDGE OF THE HIGH COURT)