REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A6/2022
DPP Ref No: VB 12/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

14-**04-2023** **DATE**

PD. PHAHLANE **SIGNATURE**

In the matter between:

DERRICK SIBUSISO NGONGWANE **APPELLANT**

and

THE STATE **RESPONDENT**

This judgment was issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by her secretary. The date of this judgment is deemed to be 14 April 2023.

JUDGMENT

PHAHLANE, J (van der Westhuizen, J and De Vos, AJ concurring)

[1] On 2 October 2012, the appellant who was legally represented during trial proceedings was convicted by the High Court, Circuit Local Division for the Eastern Circuit District, Lydenburg on four counts, namely: (1) Housebreaking with the intent to rape and rob; (2) Rape read with the provisions of section 51(1) of Act 105 of 1997 ("the Act"); (3) Attempted murder; and (4) Robbery with aggravating circumstances read with the provisions of section 51(2) of the Act. The appellant pleaded guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ("CPA") in respect of all the counts.

[2] He was sentenced to ten (10) years imprisonment for housebreaking with the intent to rape and rob; life imprisonment on the count of rape; twenty-five (25) years imprisonment for attempted murder; and fifteen (15) years imprisonment on the count of robbery with aggravating circumstances. It is common cause that the trial court ordered the sentences to run concurrently to mitigate the harshness of the cumulative effect of the sentences in terms of section 280 of the CPA which provides the sentencing court with a discretion when sentencing an accused to several sentences, to make an order that such sentences run concurrently.[1] On 7 March 2016, the trial court granted the appellant leave to appeal against the sentence of life imprisonment imposed in respect of the count of rape, and against 25 year sentence imposed in respect of the count of attempted murder.

[3] As the appeal is against sentence only, it is not necessary to deal in detail with the evidence on the merits. However, one needs to have a brief background in order to appreciate the ultimate sentence. The offences for which the appellant was convicted and sentenced occurred on 11 August 2011 at or near Lydenburg. On the day of the incident, the appellant went to the house of the complainant,

[1] Section 280 - Cumulative or concurrent sentences:
(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

around 19:00 and jumped the wall and thereafter broke and entered the house of the complainant. He demanded money from the complainant who was at the time in the living room. He took her to her bedroom, and then dragged her to the dining room where he raped her. When he was finished, he took out a knife and stabbed her countless times on the neck and head. He thereafter dragged her to another room where he tied her hands with an electrical cord and proceeded to her bedroom where took some items belonging to the complainant.

[4] The grounds of appeal as noted in the notice of appeal is that the trial court erred in applying the provisions of section 51(1) of the Act in imposing a sentence of life imprisonment on the count of rape, and further imposing a sentence of 25 years imprisonment on the count of attempted murder. It is averred that the trial court erred in not considering the personal circumstances of the appellant as constituting substantial and compelling circumstances which justified a deviation from the imposition of the prescribed minimum sentence of life imprisonment, and further disregarded the element of mercy, because both sentences leave no room for rehabilitation for the appellant. In this regard, the appellant submitted that both sentences are strikingly inappropriate and are not proportionate to the totality of the accepted facts placed in mitigation.

[5] It is on this basis that Mr. Van As appearing on behalf of the appellant submitted that the sentence imposed is strikingly inappropriate and induces a sense of shock for the following reasons:

5.1 By sentencing the appellant on the counts of rape and attempted murder where aggravating factors in the count of rape constitute the elements of attempted murder, thereby resulting in a duplication of sentences.

5.2 That the trial court erroneously concluded that the stabbing of the complainant after she was raped brought into operation the provisions of section 51(1) of the Act because this does not conform to the offences envisaged under this section when read with the provisions of Schedule 2, Part 1 where grievous bodily harm is inflicted in an attempt to subdue or

overpower the victim, and is directly linked to the rape itself with the intention of overpowering and/or controlling the victim in order to execute the rape.

5.3 That should the appeal court find that the trial court was correct in concluding that the rape in count 2 was committed with the infliction of grievous bodily harm, then it is submitted that convicting the appellant of attempted murder on the same facts amounts to a duplication of convictions and sentences. Relying on the case of ***S v Grobler,***[2] Mr. Van As submitted that the trial court erred in imposing sentence on both counts as the sentence has the effect of having the appellant serving two sentences for an action where there was a single intent.

[6] The respondent opposed the appeal and submitted that the sentence imposed is fair and appropriate under the circumstances. It was argued that the trial court did not misdirect itself as it took into consideration all the relevant factors when sentencing the appellant. As far as the appellant's contention that the stabbing of the complainant occurred after the complainant was raped, and that such action did not call for the application of the provisions of section 51(1) of the Act, the respondent argued that the appellant knew when he pleaded to the charges put to him, that he was pleading guilty to rape involving the infliction of grievous bodily harm which attracts the application of section 51(1) of the Act, and that he confirmed to the court that he understands the provisions of the Act and what it entails.

[7] The respondent further argued, and correctly so, that the definition of the word "involving" in the Act, does not state whether the infliction of bodily injury should be before the rape, or during the process, or after rape has occurred because the appellant's actions showed a continuation to overpower the complainant thereby causing her to succumb to the rape perpetrated on her.

[2] 1966 (1) SA 507 (A)

[8] I am inclined to agree with the respondent's submission because the provisions of Section 51(1) and Part I of Schedule 2 of the Act are applicable to count 2 because the offence involved the infliction of grievous bodily harm[3]. In my view, the offence of rape is an act independent from the act of attempted murder and a conviction on both cannot result in a duplication of sentences.

[9] Having said that, the argument that trial court erred in convicting the appellant on count 2 and 3 because they constitute a duplication of convictions is misplaced because the appellant was legally represented during the trial proceedings, and he confirmed his plea. It is therefore not necessary to deal at this stage with conviction as it relates to the merits. It follows that the appellant cannot at this stage of the appeal address conviction as this aspect is not the issue for determination by this court. As this appeal is against sentence only, the factual findings of the trial court based on the contents of the appellant's guilty plea must be accepted because the trial court was satisfied that all the elements of the offences pleaded to have been complied with[4].

[10] In order to deal with the grounds of appeal relating to the alleged misdirection by the trial court, it is important to restate the legal principles on sentencing. It is trite law that the imposition of sentence falls within the discretion of the court burdened with the task of imposing the sentence[5] and the appeal court will only interfere with the sentence if the reasoning of the trial court was vitiated by misdirection, or the sentence imposed induces a sense of shock or can be said to be startling inappropriate. Nonetheless, a mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. The sentence must be of such a nature, degree, or seriousness that it shows that the trial court

[3] Section 51 (1) read with Part 1 of Schedule 2 contain various manifestations of rape. The section provide that: "(1) Notwithstanding any other law, but subject to subsections (3) and (6) a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life, where the offence is of "Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, involving the infliction of grievous bodily harm"; See also: Moabi v state (A888/140 [2018] ZAGPPHC 470.

[4] See: paragraph 1 of Judgment (at page 16 of record).

[5] Mokela v The State 2012 (1) SACR 431 (SCA).

did not exercise its sentencing discretion at all, or exercised it improperly, or unreasonably. This court must also determine, as a court of appeal, whether the sentence imposed on the appellant was justified.

[11] The general principles governing the imposition of a sentence in terms of the Act as articulated by the Supreme Court of Appeal in ***S v Malgas***[6] cannot be ignored. Referring to ***Malgas,*** the Supreme Court of Appeal in ***S v Matyityi***[7] reaffirmed that:

> "*The starting point for a court that is required to impose a sentence in terms of Act 105 of 1997 is not a clean slate on which the court is free to inscribe whatever sentence it deems appropriate, but the sentence that is prescribed for the specified crime in the legislation*".

[12] In dealing with the court's approach in appeals against sentence, Boshielo JA in ***Mokela v The State***[8] stated that:

> *"This salutary principle implies that the appeal court does not enjoy carte balance to interfere with sentence which have been properly imposed by a sentencing court".*

[13] The appellant was warned of the provisions of the Act[9]. The offence of rape for which he was convicted and sentenced for, falls under the purview of the Act and carries a prescribed sentence of life imprisonment. To avoid this sentence, the appellant had to satisfy the trial court that substantial and compelling circumstances existed which justify the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment. The trial court did not find such circumstances.

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[6] 2001 (1) SACR 469 (SCA)
[7] (695/09) [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 ALL SA 424 (SCA)
[8] 2012 (1) SACR 431 (SCA) at para 9
[9] Act 105 of 1997.

[14] It was submitted on behalf of the respondent that the trial court correctly found that there are no substantial and compelling circumstances that would justify the imposition of a lesser sentence than the prescribed sentence of life imprisonment on count 2. It was further submitted that the gravity of the crime committed by the appellant and the aggravating features, as well as the societal needs for an effective deterrence in this case predominated and outweighed the personal circumstances of the appellant, being the fact that he was 24 years old at the time of the commission of the offence; unmarried with no dependents; and has previous convictions.

[15] It was also submitted that the trial court was obliged to impose the prescribed minimum sentence of life imprisonment as the offence of rape fell under the provisions of Part I Schedule 2 of the Act, having found no substantial and compelling circumstances justifying the imposition of a lesser sentence. Counsel insisted that the sentence imposed was commensurate with the gravity of the offence and does not in any way evoke a sense of shock.

[16] On the other hand, counsel on behalf of the appellant "acknowledged and conceded that rape is a very serious offence, and that the incident had and will in future have far reaching consequences for the complainant". He submitted that the public's outcry against gender-based violence may be taken into account when an appropriate sentence is considered but that it should not be overemphasized. With regards to count of attempted murder, it was submitted that since there is no prescribed minimum sentence for this offence, the 25 years imprisonment imposed on the appellant is too harsh and inappropriate as it is like a sentence normally imposed on a person who has committed three murders.

[17] Considering the submissions made on behalf of the appellant and having regard to the circumstances of this case, it is important to note that the appellant was not a stranger to the complainant. During mitigation of his sentence, the appellant confirmed under cross-examination that he knew the complainant very well

because he had been to her house on many occasions begging for food and was always assisted and never turned away, and that the complainant had been a very good person to him. This aspect was taken into account by the trial court as it correctly held, in my view, that the offences were thought-out and planned because the appellant armed himself with a knife when going to the complainant's house on the day of the incident because he knew that the complainant lived alone.

[18] In considering the appropriate sentence to impose, the trial court took into account, the appellant's personal circumstances and was also mindful of the 'triad' factors pertaining to sentences as enunciated in ***S v Zinn***[10] namely: 'the crime, the offender and the interests of society. With that in mind, it is important to heed to the purpose for which legislature was enacted when it prescribed sentences for specific offences such as rape, which falls under the purview of section 51(1) for which the appellant was convicted and sentenced for.

[19] As correctly pointed out by the respondent, the trial court considered the personal circumstances of the appellant when it imposed sentence on the appellant. Having done that, the trial court was also mindful of the warning given in ***Malgas*** *supra* that the court should not deviate from imposing the prescribed sentences for flimsy reasons, as it relates to count 2 of rape in this case.

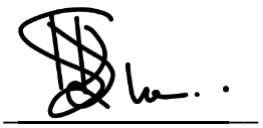
[20] Having given proper and due consideration to all the circumstances, this court cannot fault the decision of the sentencing court as far as the count of rape is concerned, nor can it be said that the sentence imposed was shocking or unjust. I cannot find any misdirection in the trial court's finding that there are no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of life imprisonment.

[10] 1969 (2) SA 537 (A)

[21] With regards to count 3 of attempted murder, the question whether the trial court misdirected itself in imposing a sentence of 25 years where the sentence is not prescribed by Legislature, gives rise to the issue which every court of appeal sitting on appeal against the sentence has to decide, namely, whether the sentence imposed is an appropriate sentence. In my view, the trial court misdirected itself because the sentence imposed is not justified under the circumstances. It is also my considered view that sentencing the appellant to serve a term of 25 years imprisonment on the count of attempted murder was a travesty of justice. Accordingly, the interests of justice demand an interference by this court and for the order of the trial court to be set aside in respect of count 3.

[22] In the circumstances, the following order is made:

1. The appeal against sentence on count 2 is dismissed.
2. The appeal against sentence on count 3 succeeds.
   2.1 The sentence handed down by the trial court on 3 October 2012 is set aside and substituted with the following sentence:
   Count 3 (Attempted Murder): Ten (10) years imprisonment.
3. It is ordered that the sentences are to run concurrently in terms of section 280(2) of the CPA.
4. The sentence in count 3 is antedated to 3 October 2012 in terms of section 282 of the CPA.



PD. PHAHLANE
JUDGE OF THE HIGH COURT

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For the Respondent	: ADV. T.S NYAKAMA : DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA Email: tnyakama@npa.gov.za
Date of Hearing	: 23 January 2023
Judgment Delivered	: 14 April 2023