

S v Ceylon and Another 2019 (1) SACR 698 (GJ)

| KEY CONCEPTS | |
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| Rape of 28-year-old female | Life sentence |
| Youth as a mitigating factor | Minimum sentences |
| Substantial and compelling circumstances | Aggravating and mitigating factors |

Introduction

The appellants were convicted in the Regional Court of rape in contravention of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) as well as attempted murder. The sentences imposed in respect of the attempted murder charge were ordered to run concurrently with the sentence of life imprisonment in respect of the rape charge. The names of the appellants were also ordered to be entered into the register for sexual offenders. This appeal to the High Court is directed against sentence.

Facts of the case

At about 01H00 on the 9 February 2009 the complainant, 28 years old and the mother of 2, asked for a lift from the appellants who were traveling in a bakkie. The first appellant was the driver of the vehicle and he was well known to the complainant as she lived in the same street as his grandfather. She was on the way from her aunt's house. They agreed and, once in the vehicle, she noticed that they were heading in the opposite direction to her intended destination. When she asked what was going on, the appellants grabbed her by her arms and brought the vehicle to a standstill in an open veld where they got out. The first appellant grabbed her and threw her to the ground. After removing her shorts and underwear, the first appellant raped her without the use of a condom while the second appellant watched. After he had ejaculated, she picked up her shorts, put them on and tried to run. The second appellant ran after her, caught her and he too removed her shorts and panties and raped her as well. He could not ejaculate and invited the first appellant to have "another go." The first appellant then proceeded to rape her two more times. The second appellant then raped her once more but was again unable to ejaculate. The second appellant had thrown her shorts in the veld. She was on her back on the ground, inside and at the back of the bakkie when the ordeal occurred, during which she was insulted and called names. The second appellant then took out an okapi knife and stabbed her several (approximately 7) times in her neck, face and upper body. The first appellant urged him to finish her off. She struggled with him for the knife which she grabbed and threw away. In the process she sustained lacerations to her fingers. The second appellant kicked her and jumped on her head two or three times and they then dragged her into the bush and left her for dead. The complainant regained consciousness and returned home where she lost consciousness again and was taken to hospital where she was treated and remained for 3 days. The first appellant was also linked to the commission of the offences by DNA

evidence. At the trial the second appellant denied that he had raped the complainant and admitted only to stabbing her two or three times.

The regional court magistrate rejected the versions of the appellants as false. Because of the multiple acts of penetration, the fact that the complainant was raped by more than one person in furtherance of common purpose and the infliction of grievous bodily harm, the minimum sentencing law came into effect in terms of s51(1) of the Criminal Law Amendment Act 105 of 1997 read with s51(3) of the Criminal Procedure Act 51 of 1977. The trial court concluded that there were no substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence for the rape charge

Appeal to the High Court

The appeal is based on whether the appellants were correctly sentenced to life imprisonment in terms of the applicable legislation if consideration was had to their personal circumstances.

The High Court took the following into account for sentencing:

- the complainant was subjected to extreme and callous brutality for an extended period of time;
- rape is a very serious offence;
- In **S v Chapman** 1997 (2) SACR 3 (SCA) (1997 (3) SA 341 the SCA referred to it as a “humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim” and said that “woman 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;”
- In **S v Ncheche** 2005 (2) SACR 386 (W) 395h – I rape was described as “an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family . . . A woman’s body is sacrosanct and anyone who violates it does so at his peril;”
- It is trite that the court in considering an appropriate sentence must have regard to and take into consideration the aims of punishment, namely deterrence, retribution, rehabilitation and prevention;
- the court should also never lose sight of the element of mercy which has been described as a balanced and humane state of thought which should temper the approach to the factors to be considered in arriving at an appropriate sentence;
- mercy does not mean maudlin sympathy for the accused – it recognises that fair punishment may sometimes have to be robust, eschews insensitive censoriousness in sentencing a fellow mortal and so avoids severity in anger;
- both appellants are unmarried and have been in custody for about one year and six months;
- the first appellant was 19 years and the second 20 when they were sentenced;
- both appellants had passed grade 6;

- the previous appellant had a previous conviction for possession of drugs;
- both had been employed before they were arrested;
- first appellant said he felt bad after his conviction and second appellant apologised for stabbing and kicking the complainant;
- in *S v Martin* 1996 (1) SACR 172 (W) at 177g – h Fleming DJP stated that “For the purposes of sentence, there is a chasm between regret and remorse. The former has no necessary implication of anything more than simply being sorry that you have committed the deed, perhaps with no deeper roots than the current adverse consequences to yourself. Remorse connotes repentance, an inner sorrow inspired by another’s plight or by a feeling of guilt;
- the true horror of the crimes committed lies in the way the appellants went about invading the complainant’s privacy and stripping her of her dignity. They first pretended to help her by giving her a lift then subdued her with violence when she resisted. The incident lasted several hours and the medical report recorded that she had fresh tears in her vagina in addition to the multiple grievous lacerations caused by the stabbing. They planned to kill her after they raped her, no doubt to escape detection and arrest;
- the incident was immensely traumatic for the complainant and exposed her to the risk of sexually related diseases – it is doubtful whether any human being can go through what the complainant can go through without suffering mental trauma for the most part, if not the rest, of her life.

The counsel for the appellants focused on the youthfulness of the appellant as the main ground to constitute substantial and compelling circumstances in their favour, warranting interference with the life sentence. In *S v Matyityi* 2011 (1) SACR 40 (SCA) ([2010] 2 All SA 424; [2010] ZASCA 127) the court had the following to say about the youthfulness of the offender:

“It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. Although the exact extent of the mitigation will depend on all of the circumstances of the case, in general a court will not punish an immature young person as severely as it would an adult. It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness. The question, in the final analysis, is whether the offender’s immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.”

In *DPP v Ngcobo and Others* 2009 (2) SACR 361 (SCA) ([2009] 4 All SA 295; ([2009] ZASCA 72) the fact that the appellants

were aged between 20 and 22 at the time of the premeditated murder was not regarded, on its own or with other factors, as constituting substantial and compelling circumstances.

With respect to the fact that the trial magistrate had not obtained a pre-sentencing report, the court made the following comment:

- s271(1) of the CPA makes provision that a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed;
- in *S v Ravele* 14 [2014] ZASCA 118 the SCA criticised the trial court's failure to obtain a pre-sentencing report and said that no court should proceed to sentence a youthful person (in that case 20 years old) unless it has all the facts relevant to sentencing;
- however, the present case differs in that both appellants testified under oath and placed the relevant evidence before the trial court for purposes of sentencing;
 - second appellant admitted having stabbed the complainant several times, but played it down by denying that he had raped the complainant;
 - he was the gang member who had the task of killing the complainant after they had finished raping her;
- the regional magistrate took into account the relative youthfulness of the accused;
- there is no indication that the appellants have taken any genuine responsibility for their conduct;
- the first appellant even laughed while the complainant was testifying about the rape and had to be rebuked by the magistrate;
- that does not bode well for rehabilitation, and unless rehabilitated, they pose a danger to every woman in the position of the complainant.

The High Court found that the viciousness of the overall conduct ruled out immaturity on the part of the appellants, and they were not persuaded that there were substantial and compelling circumstances which would justify a deviation from the prescribed sentence of life imprisonment, regard being had to each appellant's personal circumstances either individually or cumulatively. Given the totality of the circumstances of this case, the only appropriate sentence the court could have imposed was one of imprisonment for life for each of the appellants in respect of the rape charge. the sentencing discretion was not improperly exercised as the sentences do not appear to be totally disproportionate to the crimes. Neither are they shockingly inappropriate.

The appeal thus failed.