SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 101/2013

Reportable

In the matter between:

THE STATE **APPELLANT**

and

PHAKAMANI A NKUNKUMA **FIRST RESPONDENT**

BULELANI MAKALENI **SECOND RESPONDENT**

AVUYILE MASETI **THIRD RESPONDENT**

Neutral citation: *The State v Nkunkuma & others* (101/13) [2013] ZASCA 122 (23 September 2013).

Coram: Ponnan, Bosielo, Theron, Wallis et Pillay JJA

Heard: **19 September 2013**

Delivered: **23 September 2013**

Summary: Appeal - In terms of s 316(B) of Criminal Procedure Act 51 of 1977 against sentences - prescribed minimum sentences – imposition of in terms of Criminal Law Amendment Act 105 of 1997 – correct approach – restated and applied – courts too frequently deviating from sentences prescribed by legislature for flimsiest of reasons – courts have a duty to implement these provisions and impose those sentences unless

truly convincing reasons exist for departing from them.

ORDER

On appeal from: Eastern Cape Circuit Local Division, East London (Kemp AJ sitting as court of first instance):

1. The appeal by the State is upheld.
2. The sentences imposed by the court a quo on the respondents are set aside and replaced with the following:

   '(a) Accused numbers one and three are sentenced as follows:

   (i) In respect of count 1, the housebreaking with intent to rob, the accused are sentenced to two years' imprisonment;

   (ii) In respect of count 2, the robbery with aggravating circumstances, the accused are sentenced to fifteen years' imprisonment;

   (iii) In respect of count 3, the rape, the accused are sentenced to life imprisonment.

   (b) Accused number two is sentenced as follows:

   (i) In respect of count 1, the housebreaking with intent to rob, the accused is sentenced to two years' imprisonment;

   (ii) In respect of count 2, the robbery with aggravating circumstances, the accused is sentenced to twelve years' imprisonment;

   (iii) The sentence imposed on count 1 is ordered to run concurrently with that imposed on count 2.'

JUDGMENT

Pillay JA (Ponnan, Bosielo, Theron et Wallis JJA concurring):

[1] During 2011 TB, a 38-year old woman, lived together with her mother BB, and 3

year-old son, on a smallholding near Beacon Bay, just outside East London. During the course of the early evening of 20 April 2011 TB went out. Shortly after going to bed with her grandson at about 10 pm, BB awoke to find three intruders in their home. Two of them were armed with knives. They demanded money from her whilst also searching the house for valuables. When BB asked if she could switch on the television so as to calm her grandson, the one who appeared to be the leader threatened to electrocute him if she did not do as she was told. At that stage the youngest of the three intruders sought to reassure her that nothing would happen to them.

[2] During the course of the burglary TB returned. She was accompanied by a male friend. The three intruders, it would appear, then fled. Having been informed of the incident, TB's male friend left to get help. In his absence, the three robbers returned. The leader asked TB for money and when she said she did not have any, he assaulted her. The three robbers then packed their loot into bags.

[3] When the robbers left with the loot, the leader pulled TB along with them. She was made to traverse rugged terrain in the dark. After a short distance, they stopped and the three robbers engaged in a private discussion. She was then told to undress and lie on the ground. She co-operated out of fear and took off her jeans and boots and lay on her back near a clump of trees. She was then told to turn onto her belly and when she complied, she was raped anally by one of them while the leader held a knife to her throat. The leader then raped her vaginally as did one of the others thereafter. She was then told to collect her clothes and flee or she would be killed. She managed to make her way back home in the dark.

[4] During the rape, TB's diamond ring and bracelet were taken from her by the perpetrators. A number of other items were also taken during the robbery. These included a cellular phone, a camera, a silver chain, a watch, five bracelets, three other rings, five necklaces and two brooches. The total value of all of the stolen items was estimated at R7 000.

[5] The three respondents, Phakamani Allan Nkunkuma, Bulelani Makaleni and Avuyile Maseti, were arrested two or three days later in possession of some of the items which were stolen from the complainants. They were indicted in the High Court (East London Local Circuit Division) before Kemp AJ, on charges of housebreaking with intent to rob (count 1), robbery with aggravating circumstances as defined in s 1 of Act 51 of 1977 (count 2) and rape in contravention of the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (count 3). The second respondent was not indicted on count 3. Before pleading to the charges, they were alerted to the prospect that in the event of a conviction, the State intended to invoke the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) which prescribes minimum sentences for certain scheduled offences. Both robbery and rape are included in the Schedules of the Act. In addition to the fact that they were found in possession of the stolen items upon their arrest a few days later, the State also relied on DNA evidence that linked the first and third appellants to the rape and an incriminating statement from the second respondent to a police captain that placed him at the scene. Notwithstanding their pleas of not guilty, they were all convicted as charged.

[6] They were sentenced as follows:

'(a) Accused number one:

(i) In respect of count one – two years' imprisonment;

(ii) In respect of count two – ten years' imprisonment;

(iii) In respect of count three – fifteen years' imprisonment

(iv) The sentences in respect of counts one and two are ordered to run concurrently with each other;

(v) Two years of the sentence in respect of count two is ordered to run concurrently with the sentence imposed in count three;

(vi) The effective term of imprisonment is thus eighteen years.[1]

(b) Accused number two:

(i) In respect of count one – one year's imprisonment;

(ii) In respect of count two – eight years' imprisonment;

[1] The computation of the effective sentence is incorrect and should actually have read twenty-three years.

(iii) The sentences in respect of counts one and two are ordered to run concurrently with each other;

(iv) Five years of the sentence in respect of count two is suspended for five years on condition that the accused is not convicted of robbery committed during the term of suspension.

(v) The effective term of imprisonment is thus three years.

(c) Accused number three:

(i) In respect of count one – two years' imprisonment;

(ii) In respect of count two – ten years' imprisonment;

(iii) In respect of count three – fifteen years' imprisonment;

(iv) The sentences in respect of counts one and two are ordered to run concurrently with each other;

(vi) Five years of the sentence in respect of count two is ordered to run concurrently with the sentence imposed in count three.

(vii) Five years in respect of count three is suspended for five years on condition that the accused is not convicted of rape committed during the term of suspension.

(viii) The effective term of imprisonment is thus fifteen years.'

[7] In arriving at these sentences, the court below found that substantial and compelling circumstances as envisaged in s 51(3) of the Act existed in respect of each respondent in regard to count 2 and in respect of first and third respondents on count 3. Aggrieved by this finding, the appellant (State) applied to the court below for leave to appeal against the sentences in terms of s 316(B) of the Criminal Procedure Act 51 of 1977. Leave was granted to appeal to this court.

[8] The relevant parts of s 51 of the Act read as follows:

'(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.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –

(a) Part II of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) . . .

(iii) . . .

(c) . . .

(3)(*a*) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(*aA*) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed.'

[9] In *S v Malgas*,[2] the correct approach to establishing whether or not substantial and compelling circumstances exist was set out as follows:

'[7] . . . The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes.

[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence

[2] *S v Malgas* 2001 (1) SACR 469 (SCA) paras 7-9.

which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

[9] Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, "a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based - than if it is not". Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first time offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.' (See also *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo & others* 2009 (2) SACR 361 (SCA); *S v Fatyi* 2001 (1) SACR 485 (SCA).)

[10] In arriving at his conclusion that a departure from the minimum sentence was warranted, the learned Judge stated: '[u]nder all the circumstances, and bearing in mind the "predictable outcomes" mentioned in Matyityi, I am satisfied that the prescribed minimum sentences would be so disproportionate to the sentences which would normally be imposed that it constitutes substantial and compelling circumstances permitting me to impose a lesser sentence.' It is however unclear

what exactly the learned judge intended to convey by that statement. The phrase 'predictable outcomes' does not appear in *Matyityi*.[3] Apart from that, if he intended to follow *Matyityi*, its import militates against the conclusion arrived at by the court below. The court below was clearly alive to the provisions of the Act, but instead of starting its enquiry with the Act, as it ought to, it sought guidance in a range of disparate cases.[4] Those cases were however decided on their own peculiar facts. The starting point in a matter such as this is the prescribed minimum sentences ordained by the legislature. To have approached the matter as if the sentencing yardstick was the sentences imposed in those cases and to then ask whether the applicable minimum sentences could be considered too severe against that benchmark constituted a misdirection. This court is thus at large to consider the question afresh.

[11] Prior to sentencing the respondents, a pre-sentencing report was placed before the court below. Ms Nel, a social worker, investigated the position of the respondents and reported on each as follows:

(a) The first respondent was 21 years old at the time of the commission of the offences. He is the older of two children and was raised by a single parent but nonetheless enjoyed the care and guidance of members of his extended family. His father played a lesser role. He grew up in a religious home with established positive norms and values. His financial needs were always met but with the passing of his mother and then his grandparents, it became difficult with only his father maintaining them. He did not complete his secondary education and was unemployed. He had one previous conviction for housebreaking with intent to steal and theft committed on 30 July 2009. He received a totally suspended sentence for the offence (when he was about 19 years old). He denied participating in the events which led to his convictions and maintained that he was not guilty.

(b) The second respondent celebrated his nineteenth birthday just two weeks before the commission of these offences. He is reported to have grown up with

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[3] *S v Matyityi* 2011 (1) SACR 40 (SCA).

[4] Inter alia, *Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Nkomo* 2007 (2) SACR 198 (SCA); *S v Sikhipa* 2006 (2) SACR 439 (SCA); *Sekgobela v The State* (A/244/2006) [2008] ZAGPHC 89 (14 March 2008) TPD; *S v Mabuza and others* (174/01) [2007] ZASCA 110.

both his parents and is the older of two children. However, his mother was an alcoholic and had a wayward lifestyle which, in turn, had a negative impact on him. This seemed to have been countered somewhat by the efforts of his wheelchair-bound father who was a church minister. He was devastated by the passing of his father and consequently left school in grade 9. He managed to obtain employment and helped his grandmother care for the family. He participated in sport. He had no previous convictions. He continued to deny his guilt and maintained that he did not know anything about the crimes.

(c) The third respondent was 22 years and three months old when the offences were committed. He was reported to have grown up in a stable home and for which his father provided well. His parents instilled positive norms and values in him. After the death of his father, life took a turn for the worse and his mother struggled to fend for the family. This resulted in the respondent leaving school before completing his secondary education. He gained income from casual employment. He had a girlfriend with whom he has a child. He has two previous convictions. The first was for robbery for which he received a totally suspended sentence in November 2005 (when he was 15 years old). The second was for housebreaking with intent to steal and theft (when he was about 16 years old). He received a non-custodial sentence in respect of this offence also. He too denied any guilt and maintained that he had nothing to do with the commission of these crimes.

[12] In so far as TB is concerned, it is common cause that as a result of her ordeal, she sustained a number of injuries which included a laceration to her inner lip, multiple bruises to her buttocks, abrasions and scratches to her legs. None of these physical injuries were described as serious. However, the psychological impact still remained devastating. She lived in close proximity to her immediate family in a pleasant country environment. She worked in East London. She found this an enjoyable life. After the rape she felt insecure, violated and developed a low self-esteem. This caused her to abandon her employment and home and to relocate with her son to Johannesburg.

[13] It is unclear which factors were actually held by the court below to constitute substantial and compelling circumstances. The learned judge held:

'All three pleaded alibi defences in the face of overwhelming evidence against them and it is thus difficult to avoid the conclusion that they are unremorseful and do not appreciate what society demands of them. However, I would be failing in my duties as a sentencing officer if I did not bear in mind their actual youthfulness and the relative gravity of the crimes. Their not guilty pleas were clearly misguided and may not have been so much proof of their lack of remorse as proof of their immaturity.'

[14] Those factors do not without more constitute substantial and compelling circumstances for as Ponnan JA pointed out in *S v Matyityi*:[5]

'[13] . . . There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.

[14] Turning to the respondent's age: what exactly about the respondent's age tipped the scales in his favour, was not elaborated upon by the learned judge. During the course of the judgment reference was made to the respondent's 'relative youthfulness', without any attempt at defining what exactly that meant in respect of this particular individual. 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 rule out immaturity. Although the exact extent of the mitigation will depend on

[5] Paras 13-14.

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. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box, and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him, to have caused him to act in the manner in which he did.'

[15] Here the three respondents breached the sanctity of their victims' home. Having made good their escape when TB returned, they came back first to rob her as well and then to force her into the veld where she was raped more than once by first and third respondents. It must have been a terrifying ordeal for all of the victims. TB testified that she felt forced to co-operate with her attackers as she thought that they were planning to kill her.

[16] Rape and robbery have become serious social problems. It is not difficult to take judicial notice of this phenomenon in the light of the number of such cases dealt with by the regional courts, the High Courts and those which eventually come to this court. The shocking statistics regarding rape (albeit some eight years old), dealt with in *S v De Beer*[6] and referred to in *Matyityi*, are set out in the following quote:

'It is widely accepted that the statistics of reported rape reflect only a small percentage of actual offences. NICRO estimates that only 1 out of every 20 rapes is reported, whilst the South African Police Service puts the figure at 1 out of 35. For the first six months of 1998, 23 374 rapes were reported nationally. As an annual indicator of rape employing the lower

[6] *S v De Beer* 2005 JDR 0004 (SCA) para 19.

1 out of 20 estimate, the figure was a staggering 934 960. Research at the Sexual Offences Court in the Western Cape, for the same period, reveals that of the reported rape cases: 56.62% were referred to court; 18.67% were prosecuted; and, only 10.84% received guilty verdicts.'

[17] Rape must rank as the worst invasive and dehumanising violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution. There does not seem to be any significant decline in the incidence of rape since the publication of the statistics referred to above. The same can be said of robbery. No matter how they are viewed, society has called, on more than one occasion, for the courts to deal with offenders of such crimes sternly and decisively.

[18] In the cases of first respondent, who was identified as the leader, and the third respondent, who also played a significant role in the events of the night, there are no substantial and compelling circumstances which justify a departure from the prescribed minimum sentences. Had the high court considered the triad of the offence, offender and the interests of society and sought to properly balance those against each other, the prescribed minimum sentences should have been imposed on first and third respondents.

[19] The position of second respondent is different. His role appears to have been substantially less than the others. There is no evidence that he actively assisted in taking TB out of the house. He also attempted to re-assure BB, when her grandson was threatened with electrocution. He was barely 19 years old at the material time and has a clean record. He was affected by his mother's wayward lifestyle though this was somewhat balanced by his father's teachings. He also tried to assist in caring for what was left of the family after his father died by obtaining employment. He spent eleven months in custody awaiting his trial. These factors cumulatively constitute substantial and compelling circumstances.

[20] However, the sentence of an effective three years' of imprisonment is woefully inappropriate and is shockingly lenient in the light of the seriousness of the crimes and the manner in which they were committed. The prescribed minimum sentence of 15 years' imprisonment remains the starting point. In my view, taking all the factors into consideration a reduction of 3 years would be justified in his case.

[21] In the result:

1. The appeal by the State is upheld.
2. The sentences imposed by the court a quo on the respondents are set aside and replaced with the following:

'(a) Accused numbers one and three are sentenced as follows:

(i) In respect of count 1, the housebreaking with intent to rob, the accused are sentenced to two years' imprisonment;

(ii) In respect of count 2, the robbery with aggravating circumstances, the accused are sentenced to fifteen years' imprisonment;

(iii) In respect of count 3, the rape, the accused are sentenced to life imprisonment.

(b) Accused number two is sentenced as follows:

(i) In respect of count 1, the housebreaking with intent to rob, the accused is sentenced to two years' imprisonment;

(ii) In respect of count 2, the robbery with aggravating circumstances, the accused is sentenced to twelve years' imprisonment;

(iii) The sentence imposed on count 1 is ordered to run concurrently with that imposed on count 2.'

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R. PILLAY
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT: Adv N C Turner
Instructed by:

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Director of Public Prosecutions, Bloemfontein

FOR RESPONDENTS: Adv E Crouse
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