THE SUPREME COURT OF APPEAL SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1344/2016

In the matter between:

PATRICK VUSIMUZI NCGOBO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Ngcobo v S* (1344/2016) 2018 ZASCA 06 (23 February 2018)

Coram: WALLIS JA and PILLAY and SCHIPPERS AJJA

Date of Hearing : 15 February 2018

Date of Judgment : 23 February 2018

Summary: Rape – sentence – life imprisonment - appellant and complainant aged 23 and 16 years respectively – period awaiting trial one of several factors to be considered cumulatively in determining whether substantial and compelling circumstances exist and proportionality of sentence – interference only if misdirection or trial court's sentence grossly disproportionate.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (K Pillay J, McLaren J concurring, on appeal from the Regional Court, Ixopo), it is ordered that:

The appeal is dismissed.

JUDGMENT

Pillay AJA (Wallis JA and Schippers AJA concurring)

[1] On 18 September 2006 the complainant then aged sixteen years was studying in her room in Mangwaneni, Bulwer in the KwaZulu-Natal Midlands. She was expecting her boyfriend W to bring her a book. She heard a knock at the door. Assuming that it was W she opened the door. Instead it was the appellant.

[2] The appellant grabbed her and covered her mouth with his hand so that she could not scream. Pulling her to him he told her that he had returned from prison. He hit her with clenched fists many times demanding that she call her sister with whom he previously had a relationship. The complainant refused to do so. He threatened to shoot her. After asking her whom she had been expecting he said that they must go to W. She refused to go with him. He pulled her away saying that they were no longer going to W's house. He forced her onto the ground and raped her. Then he dragged her to his house some two or three kilometres away. There he pushed her onto a bed and raped her again. She sustained bruises on her legs and swelling of her face.

[3] When the appellant fell asleep the complainant escaped. She made her way to a bar owned by her brother-in-law. Someone telephoned for her brother-in-law. He arrived shortly thereafter with his father. The matter was reported to the police. The appellant was arrested that day. He was 23 years at the time.

[4] In his defence the appellant alleged that he was in a secret relationship with the complainant who did not want her parents to know about their affair. Because her sister was his girlfriend, her parents would have 'expelled' her from their home if they found out about their affair. Therefore, fearing her parents, she lied that he had raped her when they had sexual intercourse only once at his house.

[5] On 5 September 2008, the regional court in Ixopo convicted the appellant of two counts of rape falling under ss 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (the Act) and sentenced him to a term of life imprisonment for both counts taken together. On an automatic appeal in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 38 of 2007 the KwaZulu-Natal Division of the High Court, Pietermaritzburg, (McLaren and K. Pillay JJ) confirmed the conviction and sentence of life imprisonment. On 3 November 2016 this court granted special leave to appeal against sentence.

[6] The appellant's grounds of appeal were that the courts below had over emphasised the seriousness of the crime without sufficient regard to his personal circumstances, in particular, that he was gainfully employed and supported two dependants. Significantly, they did not emphasise sufficiently the two years he had spent in custody awaiting trial; for this the appellant relied on *S* v *Seboko* 2009 (2) SACR 573 (NCK) at 583 and *S* v *Radebe and Another* 2013 (2) SACR 165 (SCA) at 168-169. Moreover it was contended that the sentence of life imprisonment was disproportionate to the crime taking into account the age of the complainant; for this he relied on *S v Sangweni* 2010 (1) SACR 419 (KZP).

[7] For the State, counsel submitted that the only issue for the court to decide was whether the sentence induced a sense of shock and was disproportionate in the circumstances. As for time spent in custody it was not on its own a substantial and compelling circumstance but went to determining whether the sentence was proportionate and just. Counsel relied on *Radebe* and *Director of Public Prosecutions North Gauteng, Pretoria* v *Gcwala and Others* 2014 (2) SACR 337 (SCA).

[8] The evidence is limited providing little background into the appellant's reasons for committing the crime. As in many cases like this one there were no pre-sentencing and victim impact reports. Such reports, properly prepared, would have given the court deeper insights into the personality and identities of the appellant and the complainant, why he committed the crime and how she reacted to it.[1] However, procuring useful pre-sentencing reports is both unaffordable and time-consuming especially when the appellant wants a speedy trial.[2] In the circumstances, the courts have to do their best with what is presented to them.

[9] After considering the evidence submitted in mitigation, the trial court found that there were no substantial and compelling circumstances present justifying a deviation from the prescribed minimum sentence and imposed a term of life imprisonment. On appeal, the full bench, relying on *S v Malgas* 2001 (1) SACR 469 (SCA) and *S v Matyiti* 2011 (1) SACR 40 (SCA) on the approach to sentencing, found that that there was no evidence before the trial court to suggest that the appellant was 'immature to such an extent that his immaturity [could] operate as a mitigating factor'. Mindful of his lack of remorse, the full bench found that the magistrate had not committed any misdirection in imposing life imprisonment. Even though no evidence was presented of physical or psychological trauma that the complainant would have endured, the full bench insightfully accepted that 'common sense dictates that [the trauma] could not have been trifling'.

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[1] *S v Mhlongo* 2016 (2) SACR 611 (SCA) para 22-23; SS Terblanche '*A guide to sentencing in South Africa'* 3rd edition p117 para 8.2.
[2] *S v Mhlongo*; Terblanche p117 para 8.3.

[10] I turn to the two grounds of appeal advanced before us:

(a) the delay of about two years before the trial commenced; and

(b) the proportionality of the sentence to the crime, the interests of the appellant and of society.

[11] At the outset this is an appeal in which interference with the sentence will be justified only if the trial court is shown to have misdirected itself in some respect or if the sentence imposed was so disturbingly inappropriate or disproportionate that 'no reasonable court would have imposed it.' The test is not whether the trial court was wrong but whether it exercised its discretion properly.[3]

[12] As to the first ground, the appellant was arrested on 18 September 2006, just hours after he had raped the complainant. On 18 January 2008, he appeared for the first time in the regional court. He applied for bail unsuccessfully in the district court and twice thereafter in the regional court. At his request, the third bail application was adjourned several times to enable him to secure the attendance of his witness and his choice of legal representation. As at 13 November 2007, the appellant was still awaiting the outcome of his application for legal aid. On 29 May 2008, his preferred counsel who represented him in the first bail application refused to represent him in the trial.

[13] Adjournments at the instance of the State were initially for purposes of investigation; on 20 July 2007 for a decision by the Director of Public Prosecutions; and, eventually on 8 October 2007 for a regional court date. On 29 May 2008, the State declared its readiness for trial. But the appellant had still not secured legal aid. Eventually, the matter was remanded for trial on 17 July 2008.

[3] *S v Romer* 2011 (2) SACR 153 (SCA) para 22-23.

[14] Typically some delays seem to have been at the instance of the State and others at the instance of the appellant. Primarily the appellant remained in custody because his three bail applications failed. Even if there were delays this court said in *Radebe*:

'the test was not whether on its own that period of detention constituted a "substantial and compelling circumstance", but whether the effective sentence proposed was proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, was a just one.'

Furthermore:

'the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified.'[4]

In short, a pre-conviction period of imprisonment is not, on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence imposed is disproportionate or unjust. After applying *Malgas*, *S v Dodo* 2001 (3) SA 382 (CC) and *S v Vilakazi* 2012 (6) SA 353 (SCA), this court in *Radebe*[5] confirmed the minimum sentence and dismissed the appeal.

[15] So to the second ground of appeal I turn. Two years earlier, and probably unknown to the court below, a differently constituted full bench of the KwaZulu-Natal Division of the High Court applied a proportionality test to reduce a life sentence for rape of a child to 18 years.[6] Counsel for the appellant urged the court to apply the approach to proportionality in *Sangweni* to arrive at a lesser sentence.[7]

[16] This appeal serves before us approximately 20 years after the promulgation of the Act commonly referred to as the minimum sentence legislation. Ten years ago in sentencing the appellant the trial court lamented the prevalence of the crime of rape of women and children. It noted the personal circumstances of the appellant to include his age being 25 years at the time of sentencing, his having two minor children and his employment that earned him R900 per week. It accepted that

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[4] *S v Radebe* para 14.
[5] *S v Radebe* para14-16.
[6] *S v Sangweni* was decided on November 10, 2009.
[7] *S v Sangweni*.

he had no previous convictions relevant to this case. However, it viewed the aggravating features of his conduct in a 'very serious light'; not only did he rape the complainant twice but he also dragged and assaulted her. It noted the age of the complainant and rejected the proposition that the complainant 'was not psychologically affected by the incident.' Noting the lack of medical evidence it remarked that such evidence would have assisted in assessing the psychological impact on the complainant. On this basis it found no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment. Not even the appellant's time in custody for two years moved the court to consider a lesser sentence.

[17] When the full bench heard the matter on 8 November 2011 *Matyiti* had recently been decided. In *Matyiti* the SCA concluded that neither the age of the appellant, nor his background circumstances, constituted substantial and compelling circumstances. It held that the circumstances of the crimes were heinous and that the statutory minimum term of life imprisonment was not disproportionate. It accordingly altered the sentence of 25 years imprisonment imposed by the trial court to one of life imprisonment on each count.

[18] In this case the full bench applied *Malgas and Matyiti.* Not only was it alive to the requirement that sentences must be proportionate but also that it 'may only interfere if an injustice would result, which [was] a fairly high test.' It found that the appellant had failed to advance any evidence that his immaturity should count in mitigation. Nor did he show remorse. Endorsing the trial court's finding about the absence of substantial and compelling circumstances the full bench found no misdirection in the trial court's sentence. Accordingly it upheld in the sentence of life imprisonment.

[19] Before us counsel for the appellant urged that a sentence of between 20 and 25 years would be proportionate, mitigated appropriately by the 2 years awaiting trial. These considerations should be viewed cumulatively with other factors previously advanced in mitigation.

[20] In *Dodo* the Constitutional Court held that not only must the length of sentences be proportionate to the offence but sentences must not be 'grossly disproportionate' to what an offender deserves.[8] A grossly disproportionate sentence would be a lengthy term of imprisonment that bears no relationship to what the offence merits.[9] In summary:

'On the construction that *Malgas* places on the concept ''substantial and compelling circumstances'' in s 51(3)*(a)*, which is correct, s 51(1) does not require the high court to impose a sentence of life imprisonment in circumstances where it would be inconsistent with the offender's right guaranteed by s 12(1)*(e)* of the Constitution.' [10]

[21] Sentencing is the prerogative of the trial court.[11] In my view the difference that the two years would make to the sentence of life imprisonment is so marginal that it does not render the sentence shockingly disproportionate. Nor would it be, without remorse on the appellant's part, inconsistent with his countervailing constitutional rights. Whether members of this bench would have arrived at a lesser sentence is not the test. For this court to interfere with the sentence it must first find a misdirection by the courts below. It can find none. Accordingly, the appeal is dismissed.

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Pillay AJA

[8] *S v Dodo* para 26, 31-41.
[9] *S v Dodo* para 38.
[10] *S v Dodo* para 40.
[11] *S v Romer* above para 23.

Appearances:

For Appellant:	Z Anastasiou
Instructed by:	Pietermaritzburg Justice Centre
For Respondent:	C Kander
	National Director of Public Prosecutions, KwaZulu-Natal.