REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A180/2014
DATE: 12 DECEMBER 2014

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

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DATE SIGNATURE

In the matter between:

OLEBOGENG MESHACK LORE First Appellant

TSHEPO MATTHEWS Second Appellant

SIFISO ALFRED DLAMINI Third Appellant

and

THE STATE Respondent

J U D G M E N T

MASHILE, J:

[1] The three Appellants herein appeared before the Regional Court for the Division of South Gauteng held at Randfontein on 15 February 2011 subsequent to each of them having been charged with one count of rape and two counts of kidnapping of two M[…] sisters, L[…] and K[…] (hereinafter "L[…]" and "K[…]").

[2] The charges were with aggravating circumstances as envisaged in Section 51(2) Part 2 of Schedule 3 of the Criminal Law amendment Act No. 105 of 1997 (hereinafter "the Act").

[3] For that reason, the Appellants were properly warned of the possible invocation of Section 51(2) in the event that the court found them guilty as charged and did not find compelling and substantial circumstances justifying deviation from the imposable minimum sentence.

[4] All three Appellants were legally represented throughout the proceedings. They pleaded not guilty to all the charges and made exculpatory statements in terms of Section 115 of the Criminal Procedure Act No. 51 of 1977.

[5] Appellants 1 and 2 admitted having had consensual sexual intercourse with L[…] while Appellant 3 also alleged that the sexual intercourse with K[…] was with her blessing. These admissions were formally recorded in terms of Section 220 of the Criminal Procedure Act No. 51 of 1977.

[6] On 19 September 2010 the court a quo found Appellants 1 and 2 guilty for the rape of L[…] and Appellant 3 for the rape of K[…]. The court further convicted each Appellant of two counts of kidnapping of each sister.

[7] On 29 September 2010, the court sentenced each Appellant to life imprisonment on each rape count. It further sentenced each Appellant to 4 years imprisonment on each count of kidnapping. The court decreed the sentence on kidnapping to run concurrently with the life sentence such that each Appellant is to serve one life sentence.

[8] On 13 August 2012, the Appellants brought an application for leave to appeal against both conviction and sentence. The court a quo considered the application and dismissed it. The Appellants petitioned and with the leave of this court leave to appeal against sentence was granted. This appeal is therefore against sentence only.

[9] I do not intend to set out the facts that led to the conviction of the Appellants as their petition in that regard was not successful. However, invariably and as the judgement unfolds, the court will make reference to portions of the facts that led the court *a quo* to impose the sentences that it did.

[10] Right at the onset, I need to point out that the court *a quo* warned the Appellants that it would impose life imprisonment sentences in the event that it found each of them guilty of the rape of L[…] and K[…]

who were sixteen and seventeen years old respectively at the time of their rape. It appears that the motivation of the court *a quo* for suggesting life sentences was the ages of the victims.

[11] Part 1 of Schedule 2 of the Act prescribes the imposition of a life sentence where the victim is 'under the age of sixteen'. The victims here were aged sixteen and seventeen, which means that the court *a quo's* warning about the possible imposition of a life sentence was misguided.

[12] The warning should have been that the court would be obliged to impose ten years in the case of a first offender provided that there were no compelling and substantial circumstances justifying a departure from the prescribed minimum sentence. Both legal representatives and the court for some odd reason accepted that life sentence would be the appropriate sentence in the event of a guilty finding by the court. That was simply wrong as it is not supported by the provisions of the relevant legislation.

[13] It is generally accepted that whereas trial courts continue to enjoy a substantial amount of discretion on sentence, it is incontestable that the introduction of the minimum legislation curtailed it especially where the court is unable to find compelling and substantial circumstances excusing the imposition of the minimum sentence.

[14] That said, the approach that in an appeal against sentence, a court of appeal is guided by the principle that punishment is pre-eminently a matter for

discretion of the court *a quo* and should only be interfered with if the court failed to exercise its discretion on sentence judiciously and properly continues to hold good. See *S v Rabie* 1975 (4) SA 855 (A). A sentence imposed by a lower court should only be altered if:

14.1 An irregularity took place during the trial or sentencing stage;

14.2 The court *a quo* misdirected itself in respect of the imposition of sentence; and

14.3 The sentence imposed by the court *a quo* could be described as disturbingly or shockingly inappropriate. See *S v Salzwedel and others* 1999 (2) SACR 586 (SCA) at 591 [10] and *S v Malgas* 2001 (1) SACR 469 (SCA) at 857 D-E.

[15] The enquiry for an appeal court post the minimum legislation is to establish whether or not the trial court considered facts which could constitute compelling and substantial circumstances legitimizing a deviation from the norm. See *S v PB* 2013 (2) SACR 533 (SCA) at 539. Against that backdrop, it is important to consider both the facts that were furnished by both sides as compelling and substantial circumstances and those that aggravated the sentence and weigh them up to determine whether or not the sentence should be reduced or left undisturbed.

[16] The court *a quo*, as it was obliged to do, took into account the personal circumstances of the Appellants, on the one hand, and the nature, prevalence

of the crime and the interest of the society on the other. The following were the personal circumstances which Counsel for the Appellants presented as compelling and substantial.

[17] Counsel for the Appellants presented the following in respect of Appellant 1:

17.1 He was 29 years old and unmarried;

17.2 Although he is unmarried, he is the father of two children;

17.3 The mother of the children is unemployed;

17.4 The children are maintained by their grandmother;

17.5 When he was apprehended, he had as recently as a week ago obtained new employment;

17.6 He has a Standard 5 level education and his health is excellent;

17.7 He has been in custody for almost two years; and

17.8 He is a first offender.

[18] The personal circumstances of Appellant two were tabled as follows;

18.1 He is 28 years old;

18.2 He is unmarried with no children;

18.3 He is unemployed but does work intermittently depending on the availability of piece jobs;

18.4 He has never attended any school whatsoever;

18.5 He has a previous conviction for which he was sentence to 12 months direct imprisonment 3 of which were conditionally suspended; and

18.6 Like Appellant 1, he too has been in custody awaiting trial for almost 2 years.

[19] Appellant 3's personal circumstances:

19.1 He is a 39 year old unmarried man;

19.2 He has 3 children aged, 3, 6 and 9;

19.3 Their mother is unemployed;

19.4 Prior to his arrest, he was employed at a building construction and earned an income of R3 400.00 per fortnight;

19.5 He was once shot on his hand and his health has deteriorated since his arrest;

19.6 As is his co-perpetrators, he has been in custody for approximately 2 years; and

19.7 He has a previous conviction of house breaking with intent to steal and theft for which he was sentenced to 2 years direct imprisonment in 1996.

[20] Having noted those personal circumstances the court *a quo* turned to the other factors and remarked that kidnapping and rape are very serious offences, abysmal and totally despicable. It further noted that rape terrorizes every woman particularly, the poor and defenseless.

[21] Rape occurs too frequently and it is currently aggravated by the grave risk of transmission of HIV AIDS and referred to *State v Mthenje* 2005 (2) SACR AD 386 WLD where this court stated that a woman's body is sacred and anyone who violates it does it at his peril and our legislature and the community at large correctly expect our Courts to punish rapists very severely.

[22] In aggravation of their sentence, the court also observed that the Appellants were considerably old, the youngest of them being 28 years, and still brazenly kidnapped the two helpless girls threatening them with a screwdriver. L[…], the 16 year old Complainant, was raped by Appellant 1 and 2 albeit that the one appellant did not know that the other had raped her as well. K[…] was raped by Appellant 3.

[23] All three Appellants did not seem to appreciate the enormity of the offences with which they were charged. If one were to believe their testimony that the sexual intercourse was consensual, why did they not hand back the mobile phones of the two Complainants. The Complainants continue to live with the stigma of rape while they are carrying on with their lives as though nothing has happened. It is apparent that they are not rueful at all and must accordingly be visited with harsh sentences.

[24] The court *a quo* was alive to the applicability of the Criminal Law Amendment Act No. 105 of 1997. Having made reference to the seriousness, prevalence of the crime and the interest of the society and weighed them against the personal circumstances of the Appellants, it concluded that it could not find any of their personal circumstances to be compelling and substantial.

[25] In that context, it imposed 1 life sentence direct imprisonment on each Appellant and 4 years on each count of kidnapping. These sentences were

ordered to run concurrently. I have already remarked that the court, the prosecutor and the legal representative of the Appellants seem to have been oblivious of the provisions of Part 2 of Schedule 2 of the Act.

[26] The inappropriateness of the sentence notwithstanding, the court *a quo* was correct in characterising the offences as outrageous and despicable. For that reason, the Appellants deserved the maximum sentence that any court can impose. That maximum sentence in this situation is 10 years. Counsel for the Appellants made issue about the court *a quo* not considering the 2 years that the Appellants spent while awaiting trial.

[27] In making his submission as aforesaid, he relied exclusively on *S v Brophy and Another* 2007 (1) SACR 57 (W). The method of reducing sentences as per *Brophy supra* has been criticized, That said, time spent while awaiting trial is one of the many factors that a court seized with a sentencing matter should consider. All in all, one cannot assume that it is of general application. Each case must be assessed on its own peculiar set of circumstances. See *State v Radebe* 2013 (2) SACR 165 (SCA)

[28] The violation of the Complainants' dignity and security weighs heavily in favour of the imposition of the minimum sentence. This is a case where the personal circumstances of the appellants should recede and the seriousness, nature of the offence and the interest of the society should come to the fore.

[29] This court has applied its mind to the judgment of the court *a quo* and save to correct that the minimum sentence on the rape of a victim aged 16 years old and above by a first offender is 10 years, I confirm the judgment in other respects.

[30] In the result, the sentences of life imprisonment are shockingly inappropriate. Accordingly, I uphold the appeal and make the following order:

1. The judgment and order of the court *a quo* is set aside and is replaced with the following:

> "*Appellant 1:*
>
> *10 years direct imprisonment on the one count of rape of L[…]; and*
>
> *4 years on each count of the kidnapping of L[…] and K[…].*
>
> *Appellant 2:*
>
> *10 years direct imprisonment on the one count of rape of L[…]; and*
>
> *4 years on each count of the kidnapping of L[…] and K[…].*
>
> *Appellant 3:*
>
> *10 years direct imprisonment on the one count of rape of K[…]; and*
>
> *4 years on each count of the kidnapping of L[…] and K[…].*
>
> The sentence on each count of kidnapping on each Appellant are to run concurrently with the 10 years imprisonment imposed on each of them.

The sentences are antedated to 29 September 2012."

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B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

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S STEIN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING 2 DECEMBER 2014

DATE OF JUDGMENT 12 DECEMBER 2014

COUNSEL FOR THE APPELLANT: J PENTON
INSTRUCTED BY: JOHANNESBURG JUSTICE CENTRE

COUNSEL FOR THE RESPONDENT: V H MONGWANE
INSTRUCTED BY: Director of Public Prosecutions