REPUBLIC OF SOUTH AFRICA

13/02/13

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: A144/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. 12/02/2013

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DANIEL MOSES KHOZA — Appellant

and

THE STATE — Respondent

JUDGMENT

MAGARDIE AJ

1. The Appellant, a 42 year old male person, was arraigned before the Benoni Regional Court on three counts of rape. One of the counts was with aggravating circumstances in that the prosecution alleged that the victim was gang raped, whereas the other two counts were ordinary rape charges.

2. The Appellant pleaded guilty to all three counts. It transpired during the reading of the plea that the Appellant admitted to repeated rape of the victims in respect of counts 1 and 3. In count 2 the Appellant assisted his friend to rape the victim whereafter the Appellant also raped the victim.

3. After the reading of the plea, the court *a quo* was satisfied with the plea explanation of the Appellant and accordingly convicted the Appellant on the three counts of rape.

4. The prosecution informed the court *a quo* that the Appellant had a previous conviction. However, there were no SAP69 proving such previous conviction that were handed in during the proceedings. It appears from the record that, at the time of the proceedings, the Appellant was already sentenced to a term of life imprisonment for rape during July 2010.

5. The charges of which the Appellant was convicted are visited with life imprisonment in terms of the provisions of the Criminal Law Amendment Act 105 of 1997 unless the trial court were to find that there were substantial and compelling circumstances warranting the departure from the prescribed

minimum sentences. In this case, the court *a quo* was not presented with any substantial and compelling circumstances to justify the departure from the prescribed sentences. Accordingly, the court *a quo* imposed a term of life imprisonment on each count.

6. It appears that the court *a quo* informed the Appellant that he did not need to make an application for leave to appeal against the sentence, the Appellant only needed to file a notice of appeal. In terms of the provisions of section 309B of the Criminal Procedures Act 51 of 1977 as amended, *"any accused person who wishes to note an appeal against any conviction or resultant sentence ... must apply to that court for leave against that conviction, sentence or order"*. The record reflects that the Appellant made an application for leave to appeal on 22 November 2010. However, there is no record of what became of the application or whether the application was ever decided at all. What followed was an application for condonation to the court *a quo* for the late filing of the Notice of Appeal. Again, there is no indication of what became of the subsequent application as well. Be that as it may, the Appellant petitioned this court for leave to appeal and same was granted by Justices Molopa-Sethosa and Mothle.

7. I indicated herein before that, from the record of the proceedings in the court *a quo*, there were no substantial and compelling circumstances that were presented before the court *a quo* to persuade it to depart from the imposition of the prescribed minimum sentence of life imprisonment.

8. Section 51(2) of Act 105 of 1997 makes provision for imposition of discretionary minimum sentences for a person convicted of an offence listed under Part II, Part III and Part IV of Schedule 2. Rape committed in circumstances where the victim was raped more than once, whether by an accused or a co-perpetrator or an accomplice is not one of the offences listed under Parts II, III and IV of Schedule 2.

9. It is clear that Act 105 of 1997 brought about extra ordinary sentencing regime in that it provides for the imposition of minimum sentences for certain offences which the lawmaker considered to be serious to warrant extraordinary sentences than the ones that the courts would ordinarily be inclined to impose for such offences.

10. It is trite that a court of appeal will not easily interfere with any sentence properly imposed unless the sentence evokes a feeling of shock or outrage, or the sentence is grossly excessive or insufficient, or if the sentence is totally out of proportion with the gravity of the offence, or the trial court did not exercise its discretion properly.

11. In the event that the appeal court finds that the trial court did not exercise its discretion reasonably, it will interfere with the sentence. Such will happen if the misdirection of the trial court was of such a nature, gravity or degree that the only conclusion that can be reached is that the trial court did not exercise its discretion properly. In this regard, the appeal court would ordinarily assess the sentence with a view to determine whether there is a stark difference between

the sentence of the trial court and that which the appeal court would have imposed. Even in incidents where there is no misdirection on the part of the trial court, the appeal court can still interfere with the sentence of the trial court.

12. In this case, the Appellant has a previous conviction, having been convicted of a similar offence during July 2010 and sentenced to life imprisonment. It is not clear from the record as to when the offence for which the Appellant was previously convicted was committed. The three counts of which the Appellant was convicted were committed between 06 April 2008 and 26 August 2008. If anything, that alone is an aggravating factor.

13. It is indeed so that the Appellant pleaded guilty to the three counts of rape herein. However, his guilty plea does not amount to substantial and compelling circumstances contemplated in the provisions of section 51(3)(a) of Act 105 of 1997.

14. During the hearing of this appeal the Appellant's counsel conceded that no substantial and compelling circumstances were advanced before the court *a quo*. I must also add that, in fact, the Appellant's heads of argument do not advance any reason why a lesser sentence should have been meted out to the Appellant. On the contrary, the Appellant's counsel argues that *"it is respectfully submitted that the legal representative in the trial court did not forward any convincing factors to the trial court which would render the prescribed sentences of life imprisonment disproportionate... In the light of the reported*

case law, no further convincing argument can be forwarded to the Honourable Court."

15. It is apposite to mention that the Appellant's counsel argued that the Appellant's personal circumstances do not qualify as being substantial and compelling circumstances to justify the imposition of a sentence lesser than life imprisonment. In fact, the court *a quo* considered the question of the existence or otherwise of substantial and compelling circumstances in this case and found that such did not exist.

16. I agree with the Appellant's foregoing submissions and the court *a quo's* findings about the absence of substantial and compelling circumstances which would have justified departure from the life sentences imposed herein.

17. It is so that the Appellant pleaded guilty to all the charges against him. The Appellant was 42 years of age at the time of his sentence. The prevalence of this kind of offences cannot be over emphasised. Of course, rape is a serious act of violation of a woman's dignity. I cannot overemphasise that this kind of an offence is very prevalent within our society and women look up to the courts for protection. There can be no dignified or undignified rape, rape remains a crime and an act of women violation that must be punished with appropriate penalty.

18. In **S v Malgas**[1] it was decided that, in dealing with the imposition of the prescribed minimum sentences, the court was still required to apply its mind to the question whether the sentence was proportional to the offence. This approach was also echoed in the matter of **S v Vilakazi**.[2]

19. I have not been presented with any argument or reason why this court should interfere with the sentence imposed by the court *a quo*. In the result, the appeal is dismissed.

MAGARDIE AJ

I agree and it is so ordered.

PRELLER J

[1] 2001 (1) SACR 469 SCA
[2] 2009 (1) SACR 552 SCA