REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A667/16

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

04/2/2019
DATE

SIGNATURE

In the matter between:

SIMPHIWE DAILE Appellant

and

THE STATE Respondent

JUDGMENT

MAVUNDLA J *et* MAKOLA AJ

Introduction

[1] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("**CLAA**") prescribes a sentence of imprisonment for life for a person convicted of rape, where the victim is under the age of 16 years. A court may, however,

impose a lesser sentence if it is satisfied that substantial and compelling circumstances exist which justifies the imposition of a lesser sentence than the prescribed one.

[2] On 22 February 2016, the Regional Court, Pretoria, convicted and imposed a sentence of life imprisonment on the appellant for raping the complainant, who was 9 years at the time. The appellant appeals against the conviction and the sentence imposed.

[3] The questions that arise in this appeal are:

[3.1] Did the state prove the appellant's guilt beyond a reasonable doubt?

[3.2] Are there substantial and compelling circumstances which justify the imposition of a lesser sentence than imprisonment for life?

Relevant Facts

[4] The facts are largely common cause. On 18 October 2009 the appellant, the complainant's mother and their companions were at the complainant's house where, by all accounts, large quantities of alcohol were consumed. The house has two rooms, a bedroom which the complainant shared with her mother and a sibling, and living room.

[5] The complainant, then nine years old, went to sleep in the bedroom. The television in the bedroom was on and the complainant did not switch it off when she slept.

[6] The complainant's mother and a companion remained in the other room

whilst the appellant passed out on the complainant bed. At some point during the night the appellant touched the complainant on her vagina and penetrated her using his fingers. The appellant says he thought he was touching the mother. The complainant woke up because she was feeling pain. At first she thought she was dreaming but then woke up to find appellant was on top of her, raping her.

[7] She was able to recognise the applicant because of the light from the television. She cried and the appellant told her not to cry, and not to tell her mother, he will give her money. The mother, who had fallen asleep in the other room, was alerted to the complainant's cries, went to check on her, saw the appellant putting on his trousers, and saw what looked like semen on the complainant's thighs. The appellant apologised and offered the mother money to buy her silence. She refused, alerted the community and the police. The appellant was arrested and charged with rape.

[8] The appellant denies that he raped the complainant. He, however, admits to fondling her private parts, he says that he thought the complainant was the mother. He says he only realized that he had been fondling the complainant when he came back from the toilet and found the complainant crying.

[9] The trial court found that the evidence of the complainant was coherent; she was an honest and intelligent witness who gave answers about what had happened on the day. She recalled her evidence clearly and was sober on the night in question. The trial court also found that the appellant did not recall how he had touched the complainant and he did not know if he was

on top of the complainant or not. He also did not know if he had penetrated the complainant.

[10] The trial court concluded that the appellant's propensity to change his defence suggested that it might be a fabrication or an afterthought. He tailored his evidence as it suited him; avoided pertinent questions and his evidence under cross-examination appeared to be unreliable and evasive.

[11] Based on all the evidence taken, the court concluded that the only reasonable inference was that the appellant had raped the complainant. He was convicted and sentenced to imprisonment for life.

The Conviction

[12] The appellant contends that the evidence of the complainant, being a single witness to the rape incident, was not satisfactory in material respects; the main issues that were placed in dispute were whether the appellant had penetrated the complainant, and whether he had the necessary intention to penetrate the complainant.

[13] Counsel for the appellant also argued that the appellant was not linked to the rape by way of DNA evidence and that the semen could not be scientifically detected; the absence of corroborative evidence created some doubt which should have benefitted the appellant. Furthermore, the police officers who arrested the appellant were not called as witnesses, nor were the other witnesses who were with the appellant in the house; the appellant's state of sobriety at the time of the commission of the offence could not be ascertained. It is also contended that it was possible that the

appellant did not, at the time of commission of the offence, appreciate the nature of his action and therefore lacked the necessary criminal capacity to act.

[14] Counsel for the appellant also submitted that the trial court did not take into account, alternatively, did not adequately take into account the contradictions and the improbabilities of the state's case, to the detriment of the appellant and there are serious doubts and motives why the appellant was falsely accused of raping the complainant.

[15] We point to the following factors, which, collectively, lead to the conclusion the appellant was correctly convicted by the trial court. The appellant, on his own version had consumed large quantities of alcohol to a point of inebriation. In his evidence he could not recall most of what happened but, crucially, he recalls touching and fondling the complainant although, according to him, he thought it was the mother.

[16] The evidence of the complainant is also crucial in this respect. She was in bed and woke up to find that the appellant was on top of her raping her. She cried and this alerted her mother who rushed inside the bedroom and found the appellant pulling up his trousers and she also saw what looked like semen on the complainant's thighs. The appellant tried to bribe her by giving her money to buy her silence.

[17] The fact that the complainant was a single witness to the rape incident does not detract from the totality of the evidence that led to the conviction of the appellant. The caution applicable to single witnesses may be overcome by corroboration, but this is not essential. Any other feature which increases

the confidence of the court in the reliability of the single witness may also overcome the caution. (**S v Hlongwa 1991 (1) SA CR 583 (A) at 586H-587C**; and **S v Sauls and Others 1981 (3) SA 172 (A) at 180E-G**).

[18] A trial judge will weigh his evidence, consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings and defects or contradictions in the testimony, he is satisfied that the truth has been told (**S v Webber 1971 (3) SA 754 (A) at 758**).

[19] The fact that no DNA evidence was proffered into evidence does not detract from the finding of the trial court on the guilt of the appellant. The State had led the evidence of a doctor who, as the trial court found, sufficiently explained the aspects of her report and also established conclusively that the complainant had been penetrated.

[20] The appellant submits that there were contradictions between the evidence of the complainant and her mother. In our view the fact that there may have been differences in their recollection as to whether or not a certain *Mzi*, one of the companions, had left before the complainant went to bed or not does not detract from totality of the evidence upon which the appellant was convicted. That difference is immaterial in our view.

[21] The evidence of the witnesses called by the State including the medical evidence taken together with the appellant's own admissions and the concession made by his counsel in argument that he could not find fault with the findings of the trial court, in our own view, supports the conclusion the prosecution has established the appellant's guilty beyond a reasonable

doubt.

Sentence

[22] The appellant contends that the trial court approached the sentence with vengeance and over-emphasised the seriousness of the offence to the detriment of the appellant; the sentencing court did not show any mercy to him; the sentence was only intended to break him and leave him without any hope and/or chance of being rehabilitated. Furthermore, the complainant did not suffer physical harm from the commission of the offence; the rape could not be classified as one of the worst cases of rape; the lengthy term of imprisonment imposed by the trial court is not in the best interests of the community and/or the appellant and that the public interest is not necessarily served by the imposition of very long sentences of imprisonment.

[23] The appellant contends, furthermore, that there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length and he would have to serve at least 25 years before being considered for parole and he will be 68 years then. The appellant contends that an effective period of no more than 20 years imprisonment should have been imposed.

[24] In argument, counsel for the appellant also submitted that the trial court did not take into account the period that the appellant was in custody (from 2012 to 2016) and that the sentence was harsh because the appellant was a first offender who was 37 years old when he was sentenced.

[25] This court will not interfere with the sentence of the trial court unless it is vitiated by irregularity, misdirection or is disturbingly inappropriate. An appeal court cannot, in the absence of a material misdirection by a trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. The appeal court may only interfere with the sentence imposed by the trial court when the disparity between the sentence of the trial court and the sentence which the appellate court may have imposed had it been the trial court is so marked that it can only properly be described as "shocking", "startling" or "disturbingly inappropriate". **S v Malgas 2001 (2) SA 1222 (SCA)** para [12]; **Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 43 (SCA)** at para [10]. **S v Bogaards 2013 (1) SA 1 (CC)** at para 41; **S v Hewitt 2017 (1) SACR 309 (SCA)** at para [8]

[26] A court is required to approach the question of sentencing, conscious of the fact that the Legislature has ordained life imprisonment on the practical prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. The Legislature aimed at ensuring a severe, standardised and consistent response from the courts to the commission of such crimes unless they were, and could be seen, to be truly convincing reasons for a different response.

[27] It would be an impossible task to attempt to catalogue exhaustively either those circumstances or combinations of circumstances which could rank as such and that the best one could do was to acknowledge that one is obliged

to keep in the forefront of one's mind that the specified sentence has been prescribed by law as the sentence which must be regarded as ordinarily appropriate and that personal distaste for such legislative generalisation cannot justify an indulgent approach to the characterisation of circumstances as substantial and compelling. When justifying a departure a court has to guard against lapses, conscious or unconscious, into sophistry, or spurious rationalisations or the drawing of distinctions so subtle that they can hardly be seen to exist (**Malgas** at [20]).

[28] The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater the anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease had hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterize them as substantial and compelling and such as to justify the imposition of a lesser sentence (**Malgas** at [22]).

[29] An example of the kind of circumstances which might qualify as substantial and compelling are those which reduce the moral guilt of the offender (analogous to the circumstances considered in earlier times to be capable of constituting "extenuating circumstances" in crimes which attracted the sentence of death). That will no doubt often be so but it would not be right to suppose that it is only factors diminishing moral guilt which may rank as

substantial and compelling circumstances.

[30] Importantly, courts are cautioned to respect and not to merely pay lip service to the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.

[31] A court must take into account all circumstances and determine if the prescribed sentence is indeed appropriate and proportionate to the particular offence before it imposes a prescribed sentence (**S v Vilikazi (1) SACR 552 (SCA)** at para [15]).

[32] In *Matyiti* the SCA decried the all too frequent willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the Legislature for the flimsiest of reasons that do not survive scrutiny. The courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of state, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of other arms of state (**S v Matyiti 2011 (1) SACR 40 (SCA)** at para [23]).

[33] The following factors were taken into account by the trial court, the appellant was married at the time of the sentence, he was 44 years old and had a wife and three children that he supported financially; the reports filed by the Probation Officer and the Correctional Officer which detailed the personal circumstances of the appellant from the interviews conducted with his family

members were was also considered, appellant was a first offender, a breadwinner and had dependants and an extended family.

[34] The trial court noted that rape is a very serious offence and is prevalent in its jurisdiction. It is one of the most heinous of crimes. It is a monstrous deed, often haunts the victim and subjects her to mental torment for the rest of her life, a fate often worse than the loss of life (**S v Chapman 1997 (3) SA 341 (SCA)** at 344I-J).

[35] The appellant had raped a nine-year-old child, who weighed about 45kgs and stood at 1.5 meters. Children are vulnerable to abuse, and the younger they are the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often (**S v E 1990 (2) SACR 625 (A)**; **S v D 1995 (1) SACR 259 (A)**).

[36] The court fulfils an important function in applying the law in the community. It has a duty to maintain law and order. The court operates in a society, and its decisions have an impact on the individual in the ordinary circumstances of daily life. It covers all possible ground. There is no space in life that it does not include. Society demands the imposition of harsh sentences that adequately reflect censure and retribution upon those who commit these monstrous offences and to deter would-be offenders (**S v Hewitt 2017 (1) SACR 309 (SCA)** at [9] and the authorities referred thereto).

[37] The evidence led shows that the complainant had become withdrawn and no longer participated in school activities as she used to. Her grades had dropped because of the incident. She has had to deal with community pressure; jokes from other children, often feeling embarrassed after the

incident. Her behaviour at school and at home had changed following this incident. She isolates herself from other people, and the family had to relocate following the incident as they did not feel safe living in the same hostel as the appellant. The complainant has experienced trauma and emotional impact and she has had a prolonged feeling of sadness, a feeling of hopelessness, continuous crying, negative changes in her school and concentration.

[38] The appellant contends that a life imprisonment sentence was not warranted in the circumstances of this case because the rape was "not the worst kind of rape" and, it is submitted, that the trial court ought to have found that there existed substantial and compelling circumstances which justified the imposition of a lesser sentence.

[39] In determining whether this was the "*worst kind of rape*", the following factors were borne in mind by the trial court: the appellant had first used his finger to penetrate the child; he then climbed on top of her and raped her. She was only nine years old at the time and, as the uncontroverted evidence shows, only weighed about 45 kilograms and stood at 1.5 meters. The appellant on the other hand was a 44 year old grown up man. In our view nothing could be worse. Rape is a horrifying crime, a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feeling of their victim. It is a humiliating, degrading and brutal invasion of the privacy, dignity of the victim. Worse so, if the victim is a child who was only nine years old. The court in *Hewitt* said it is an appalling and perverse

abuse of male power that strikes a blow at the very core of our claim to be a civilised society (**S v Hewitt 2017 (1) SACR 309 (SCA)** at [9]).

[40] The victim in this case had been badly affected by the rape as the evidence shows that she had become withdrawn and no longer participated in school activities, her grades had dropped because of the incident and the family has had to relocate following the incident.

[41] It was argued on behalf of the appellant that the trial court did not take into account the period of time that the appellant spent in custody from 2012 to 2016. However, a clear reading of the judgment in the trial court shows that the period that the appellant spent in custody was dealt with extensively and the trial court concluded that the period on its own did not constitute a substantial and compelling circumstance for the purposes of departing from the prescribed sentence.

[42] The appellant's youthfulness and prospects of rehabilitation must be weighed against the objective gravity of the offences, their prevalence in South Africa and the legitimate expectations of society that such crimes have to be seriously punished.

[43] For all the reasons above, we conclude that the sentence imposed by the trial court is not disproportionate to the crime, the appellant and the legitimate needs of society.

[44] We agree with the trial court that the appellant has not shown any irregularity or misdirection on the part of the trial court or that the sentence imposed by the trial court is disturbingly inappropriate.

Order

[45] In the result we make the following order:

[45.1] The appeal is dismissed.

N. M. MAVUNDLA
JUDGE OF THE HIGH COURT

MAKOLA AJ
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT *Heads were drafted by* ***S MOENG***

COUNSEL FOR RESPONDENT ***ADV K H VAN RENSBURG***

Date of the hearing: 16 April 2018
Date of the Judgment: 20 June 2018