



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR160/2020

In the matter between:

THANDANANI VUYO SISHWILI

Appellant

and

THE STATE

Respondent

ORDER

On appeal from: Regional Court, Nongoma (sitting as court of first instance):

- [1] The appeal against sentence is upheld;
- [2] The sentence of fifteen (15) years imprisonment imposed in the court *a quo* is set aside and replaced with a sentence of ten (10) years imprisonment antedated to 30 August 2016.

JUDGMENT

MARKS AJ (KRUGER J concurring)

[1] The appellant (Mr Sishwili) was convicted in the Regional Court, Nongoma on one count of Rape (c/s 3 of Act 32 of 2007) and sentenced to a period of fifteen (15) years imprisonment on 30 August 2016.

The appellant is before us, leave to appeal having been granted by the court *a quo* in respect of sentence only.

Background

[2] The appellant, who was legally represented at the trial, pleaded 'not guilty' to the Rape charge. His defence was a bare denial. The State led the Evidence of four witnesses which included the complainant. The accused testified in his own defence and no further defence witnesses were called. The learned Regional Magistrate convicted the accused of one count of Rape. The summary of proved facts reveal that the complainant who was 79 years old at the time was inside her room at approximately 10h00 am when the appellant who is a relative, entered the room. Initially, he asked for money. The complainant did not have money and told him so. He then placed her on the bed. She struggled to get away. Thereafter, the appellant removed his and her underwear and raped her. After he finished, the appellant left. The complainant sustained injuries in the form of shallow grazes and bruises. She was later examined by a doctor and received treatment. The appellant was later arrested by the police.

[3] It is trite that the appeal court may only interfere with sentence when the court *a quo* has committed a material misdirection or where the sentence imposed by the court *a quo* is so startlingly inappropriate that it warrants the interference of this court. See: *S v Malgas* 2001 (2) SA 1222 (SCA).

In *S v Pillay* 1977 (4) SA 531 (A) 535 F-G, the court said:

'As the essential enquiry in an appeal against sentence, however is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree or seriousness, that it shows directly or inferentially that the Court did not exercise its

discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence'.

[4] It is common cause between the appellant and the respondent that the trial court when imposing the sentence which it did, misdirected itself in finding that the circumstances of the Rape fell into the category of those cases where the Legislature has ordained life imprisonment. The court *a quo* made a finding that the complainant has sustained grievous bodily harm, based on the J88 medico legal report which was handed in by consent, as an Exhibit. The J88 report indicated that the injuries sustained by the complainant, during the course of the Rape, was shallow bruising to the eye and grazes to the arm. The doctor who examined the victim was not called to testify. The paucity of information relating to these injuries was of little assistance and in any event did not correlate with the injuries complained of by the complainant. A careful reading of the judgment in the court *a quo* does not provide reasons for the courts finding that grievous bodily harm was inflicted. It is clear that the State had failed to prove that the appellant had inflicted grievous bodily harm upon the complainant.

The submission that there was therefore a misdirection by the court *a quo*, is well made and can safely be regarded as the type that vitiates the court *a quo*'s decision on sentence. Therefore this court is at large to impose a sentence that meets the facts of this particular case. The prescribed minimum sentence for a single charge of Rape upon an adult female in these particular circumstances would be ten (10) years imprisonment.

[5] In the heads of argument the appellant contended that fifteen (15) years imprisonment is excessive in the circumstances and induces a sense of shock. The respondent, in their heads of argument, concede that although the minimum sentence for this type of rape attracts ten (10) years imprisonment, this court should nevertheless dismiss the appeal against the sentence of fifteen (15) years imprisonment, due to the fact that as from 2 August 2017, the Criminal Law Amendment Act, 105 of 1997 includes Rape of an 'older person' attracting a minimum sentence of life imprisonment. Further that the aggravating circumstances in this particular case warrants fifteen (15) years imprisonment which in any event was the

ordinary jurisdiction of the Regional Court.

[6] It is trite that a court imposing a sentence must reflect a balance between the offender, the crime and the interests of society.¹

It is clear that in every case, before it imposes a prescribed sentence, the court is enjoined to assess, upon a consideration of all the circumstances of a particular case, whether the prescribed sentence is indeed proportionate for the particular offence.²

Concern has also been raised that in respect of Rape charges, there is an absence of any gradation between ten (10) years imprisonment for a single rape upon an adult and life sentence for other categories of Rape.³

[7] The personal circumstances of the appellant is on record. He was 22 years old at the time he committed the offence. He is single and has one minor child. He is unemployed and suffers from asthma. The appellant has previous convictions for housebreaking with intent to steal and theft and received custodial sentences in the past. Therefore, this was not his first brush with the law.

[8] The circumstances of the Rape upon the complainant has aggravating features. The complainant was an elderly woman who regarded the appellant as her grandson. She was attacked in the sanctity of her own home when the appellant, uninvited, entered her room and violated her Constitutional rights to human dignity and bodily integrity. Although the physical injuries she sustained were not of a grievous nature, the psychological and physical trauma she has suffered at the hands of the appellant are apparent in the victim impact statement on record.

[9] Rape is regarded by society as one of the most heinous crimes.

In *S v Chapman* 1997 (2) SACR 3 SCA, it was held at para. 5 that:

¹ *S v Zinn* 1969 (2) SA 537 (A)

² *S v Dodo* 2001 (1) SACR 594 (CC) 13

³ *S v Vilakazi* 2012 (6) SA 353 SCA

'Rape is a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim'.

Gender based violence is endemic in our country. Rape is a prevalent offence and society demands that offenders receive lengthy terms of imprisonment which is ordained by the Legislature in the Minimum Sentence Legislation. It is as a result of society's outrage that the Legislature has already included further categories of Rape for life imprisonment sanction.

[10] The Criminal Law Amendment Act, 105 of 1977, as from 2 August 2017, includes the Rape of an 'older person' attracting a minimum sentence of life imprisonment. However, this amendment is not retrospective. The Rape upon the complainant was committed before this enactment. Therefore, the minimum sentence for the present category of Rape remains ten (10) years imprisonment.

[11] There being no substantial and compelling circumstances in this matter, and therefore no reason to deviate from the prescribed minimum sentence being ten (10) years imprisonment.

In conclusion, the following order is made:

- [1] The appeal against sentence is upheld;
- [2] The sentence of fifteen (15) years imprisonment imposed in the court *a quo* is set aside and replaced with a sentence of ten (10) years imprisonment antedated to 30 August 2016.

Amuthi.
MARKS AJ


KRUGER J.

I agree, and it is so ordered.

Case Information

Date of Set Down : 18 January 2021
 Date of Judgment : 22 January 2021

Counsel for the Appellant : MS L MARAIS
 c/o Pmb Justice Centre
 : Tel: (033) 394 2190
 : Email: LaurenM@legal-aid.co.za

Counsel for the Respondent : MR K M SHAH
 : Tel: (031) 334 5010
 : Cell: 084 520 0099
 : Email: Kshah@npa.gov.za

This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19 (a) of the Superior Courts Act 10 of 2013.

This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date for hand down is deemed to be 26 January 2021.