Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: [High Court]: A22/19

Case Number [Lower Court]: SSB 156/16

In the matter between:

XOLISA KOMANISI Appellant

and

THE STATE Respondent

Coram: Ndita J *et* De Waal AJ
Hearing: 8 March 2019
Judgment: 22 March 2019

JUDGMENT

De Waal AJ:

[1] The Appellant in this matter was convicted in the Regional Court, Stellenbosch (per Mr FD Tonisi) of three offences, namely (1) housebreaking with

intent to rape and rape; (2) rape of the victim at knifepoint; and (3) another count of rape.

[2] On 7 June 2018, the Regional Court sentenced the Appellant to life imprisonment with reference to the minimum sentencing regime contained in s 51(1) of the Criminal Law Amendment Act 105 of 1997.

[3] The Appellant noted an appeal in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 ("**the CPA**") against the life sentence.

[4] The grounds of appeal are as follows:

4.1. The Court *a quo* erred by not giving proper consideration to the Appellant's personal circumstances, specifically his chances of rehabilitation.

4.2. The Court *a quo* erred by not giving enough weight to the fact that the Appellant was a first offender.

4.3. Life imprisonment is shockingly inappropriate and out of proportion with the totality of the accepted facts in mitigation.

4.4. The Court *a quo* erred by overemphasising the interests of the community and the seriousness of the crime.

4.5. The Court *a quo* erred by not giving due consideration to the element of mercy to be afforded to the Appellant and gave the element of retribution too much weight.

4.6. In finding that the sentence would serve as a deterrent, the Court *a quo* erred by failing to take into account that the rape that the Appellant was found guilty of does not fall in the category of the worst cases of rape ("*some rapes are worse than others*").

4.7. The Court *a quo* placed too much emphasis on the lack of remorse by Appellant.

4.8. Another Court would have found substantial and compelling circumstances to divert from the minimum sentence of life imprisonment and would have given the Appellant a lesser sentence.

[5] In her heads of argument, Ms Kuun, an attorney of Legal-Aid South Africa, who appeared for the Appellant, suggested that even though the notice of appeal was directed at the sentence only, this Court should also consider whether the convictions are in accordance with justice. In this regard, reliance was placed on ss 304(2) and 304(4) of the CPA. She contended that the conviction on a count of housebreaking should be set aside because there was no evidence that the complainant told the Appellant that he was not allowed to enter her home.

[6] Ms Mbewana, who appeared for the State, contended that a conviction need not be considered if an appellant elects under s 309 of the CPA not to appeal against it.

[7] On reflection, Ms Kuun's submission is correct in respect of the law but wrong regarding the application thereof to the facts.

[8] When a convicted person notes an appeal in terms of s 309(1)(a) of the CPA, the automatic review procedure provided in s 302 is suspended by virtue of s 302(1)(b)(i). But s 304(4) of the CPA is not suspended. That subsection provides as follows (my underlining):

> "If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

[9] Thus, even though the appeal was against sentence only, this Court has to consider whether the conviction on housebreaking was in accordance with justice, now that the alleged incorrectness of that conviction "*has been brought to the Court's notice*".

[10] What does the phrase "*in accordance with justice*" mean? In *S v Taljaard* 2005 (1) SACR 370 (C), a Full Bench of this division held as follows at 373J-374B:

> "the words 'in accordance with justice' provide the court with some form of review power (see in this regard S v Williams (unreported decision of the CPD SS127/01)). However, were the phrase 'in accordance with justice' … to be given the meaning of compliance with legal rules of procedure only, it would mean that a Court would have to accept as its own judgment that of another court with which it might have serious qualms in respect of the merits of the conviction. That can never be in accordance with justice because the express confirmation of such a judgment as that of the High Court would so profoundly conflict with the presiding Judge's own conception of justice as to make a mockery of the very word itself. This was pointed out in S v Swartz and Another (supra in para [8]): 'It is self-evident that a Court can never form an opinion that proceedings are in accordance with justice if the evidence is insufficient for a conviction to withstand scrutiny …".

[11] Not only the procedure followed but also the merits of a conviction fall to be considered when determining whether that conviction is in accordance with justice.

[12] No issue with the procedure followed by the Court *a quo* was raised. As to the merits, the complainant testified that when the Appellant called on her to open her door, she replied that she could not do so because she had lost the key. The Appellant then went to go and fetch a key which could open her lock as it was a "*Somalian lock*" and that "*one key can open the other lock*". The Appellant was accordingly never given permission to enter the complainant's shack nor was it his version that he believed this to be the case.

[13] Flowing from the above, it cannot be said that the conviction for housebreaking was not in accordance with justice. That said, I proceed to consider the sentence.

Sentence

[14] Before I deal with the reasoning of the Court *a quo* regarding sentence and the arguments of the parties in this regard, I set out the provisions of the minimum sentencing regime which apply to a conviction in the present circumstances as well as some important qualifications introduced by the Supreme Court of Appeal ("**SCA**") and the Constitutional Court ("**CC**") regarding the application of the regime.

[15] The Criminal Law Amendment Act introduced a set of discretionary minimum sentences for certain serious offences. For present purposes, the relevant provisions of this regime are the following (my underlining and irrelevant parts omitted):

> **"51 Discretionary minimum sentences for certain serious offences**
>
> (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
>
> (3) (a) If any court referred to in subsection (1) … is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence ….
>
> (aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:
>
> (i) The complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed.

Schedule 2, Part 1

Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

(a) when committed-

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim-

(i) is a person under the age of 16 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act 13 of 2006);

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c) involving the infliction of grievous bodily harm."

[16] Save for two developments, to which I shall revert below, the legislative history and the jurisprudence regarding the constitutional validity of this section are comprehensively described in *S v Vilakazi* 2012 (6) SA 353 (SCA). The issues which were highlighted in this judgment are the following:

16.1. The minimum sentencing regime was introduced in 1998 in response to an upsurge in serious crime and was initially described as "*drastic but temporary*" measure. It was envisaged that the regime would have a life span of two years but it has been consistently extended and has become entrenched.[1]

16.2. The maximum sentence that our law allows (a life sentence) applies once any of the aggravating features is present; irrespective of how many of those features are present; irrespective of the degree to which the feature is present; and irrespective of whether the convicted person is a first or repeat offender.[2]

16.3. The regime was saved from unconstitutionality by the "*determinative test*" which was developed by the SCA in *S v Malgas* 2001 (2) SA 1222 (SCA) in terms of which if "*the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence*."[3] [The test in *Malgas* must be employed in order to determine when s 51(3)(a) can legitimately be invoked by a sentencing Court to pass a lesser sentence than that prescribed by s 51(1). To this one must add the test of "*gross disproportionality*" developed by the Constitutional Court in *S v Dodo* 2001 (3) SA 382 (CC) which, in terms of paragraph 40 of that judgment must be

[1] *Vilakazi* at paras 9-10
[2] *Vilakazi* at para 13
[3] *Vilakazi* at para 14; *Malgas* at para 25

applied in order to determine whether a sentence mandated by law is inconsistent with the offender's s 12(1)(e) constitutional right not to be punished in a cruel, inhuman and degrading way.]

16.4. It is incumbent upon a Court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.[4]

16.5. Whilst a Court must approach the matter conscious of the fact that the Legislature has ordained the prescribed sentence as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances, any circumstances that would render the prescribed sentence disproportionate to the offence would constitute the requisite "*weighty justification*" for the imposition of a lesser sentence.[5]

16.6. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case.[6]

16.7. A prescribed sentence need not be "*shockingly unjust*" before it is departed from for "*(o)ne does not calibrate injustices in a court of law*". It is enough for the sentence to be departed from if it would be unjust to impose it.[7]

[17] The offence which was the subject of the *Vilakazi* Judgment was committed on 17 September 1999.[8] Subsequently, s 52 of the Criminal Law Amendment Act, which required the Regional Court if it has convicted an accused person of an offence for which life imprisonment is prescribed, to stop the proceedings and commit the accused for sentence by a High Court, has been repealed.

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[4] *Vilakazi* at para 15
[5] *Vilakazi* at para 16
[6] *Vilakazi* at para 18
[7] *Vilakazi* at para 20
[8] *Vilakazi* at fn31

[18] Furthermore, s 51(3)(a) was introduced through the Criminal Law (Sentencing) Amendment Act 38 of 2007 with effect from 31 December 2007. That section now precludes a Court from having regard to four sets of factors when considering whether there are substantial and compelling circumstances justifying deviation from the life sentence in a case such as the present one. For present purposes, it is relevant that a Court is precluded to find that an apparent lack of physical injury to the complainant constitutes such substantial and compelling circumstances.

[19] I now turn to deal with the facts of the present matter.

[20] The complainant testified that on the weekend of 28/29 May 2016 and at […] E. Township, she went drinking traditional beer at her younger sister's place for five or six hours and then returned to her shack in the same township to sleep. Sometime afterwards, she was awakened by a knock on her door and someone calling her by her clan name, Manausa. She realised that the person calling her was the Appellant because he was in a relationship with her […]. The complainant further testified that Appellant wanted her to open the door. She replied that she could not do so because she had lost the key. The Appellant then went to go and fetch a key, opened the door and raped her three or four times over a period of three hours. She further testified that she was screaming. Appellant held a knife to her throat. Afterwards, someone from the community put her on his or her back and took her to a police van.

[21] Appellant's version was that he found the complainant at a spaza shop at about 18h00 whilst on his way to buy two beers from a shebeen. The complainant asked him to accompany her to her shack in order for her to give him R20.00 to buy her a beer and ten cigarettes. He did so. On his return, he gave her the beer and cigarettes, lit an oil lamp in her shack and spent some time with the complainant drinking the beer. Thereafter he went to his sister's place. Appellant denied ever having sex with the complainant.

[22] The main reason why the Appellant's version did not hold water is that the State presented evidence at the trial that the Appellant's DNA was found inside the

complainant's vagina. The analysis was done based on swabs taken as part of the medical examination of the complainant performed on Sunday, 29 May 2016. The forensic evidence obviously destroyed Appellant's version of the events. In response, it appears, the Appellant introduced a preposterous explanation for the presence of his DNA at the trial, which was that some 2 – 4 weeks before the incident he, his girlfriend (the complainant's […]) and the complainant fell asleep together after another drinking session. When he woke up, the complainant was sitting on top of him and there was wetness on his thighs. Needless to say, this evidence could obviously not explain why Appellant's DNA was found 2 – 4 weeks later "*inside*" the complainant's vagina. This removed any doubt regarding the accused's guilt on the rape charge.

[23] The minimum sentence of life dictated by s 51(1) of the Criminal Law Amendment Act was triggered in the present matter by two factors regarding the commission of the offence of rape:

23.1. The Court a quo found that the complainant was raped at least three times; and

23.2. The Court *a quo* found that the complainant was a disabled person.

[24] In respect of the first aspect, the complainant testified that she was rapes 3-4 times by the Appellant. In respect of the first, she testified that she suffered a stroke and that as a result, she is limping and that the whole left side of her body is paralysed. She also stated that it affects the way she speaks. She receives a SASSA grant. Appellant agreed that the complainant was disabled but claimed that he did not know the nature of her disability or where she got injured or how. His evidence was that he noticed that she could not walk properly. He knew about this before he committed the offence.

[25] Turning to the question of how the Court *a quo* went about sentencing the Appellant, the Court *a quo* recorded both mitigating and aggravating factors and found that there were no substantial and compelling circumstances justifying a departure from the ordained life sentence of imprisonment in respect of the rape. It however, did not record its reasons for finding that the life sentence would not be

disproportionate in the circumstances of the present matter, as required by the *Vilakazi dictum*.

[26] The Court *a quo* recorded that:

26.1. The Appellant at the time of sentencing was thirty years old;

26.2. The Appellant left school after passing Grade 11 and worked for Group Five Construction and earned about R3 000.00 per month;

26.3. He had four children, three of whom are living with their mothers in the Eastern Cape;

26.4. He lived with his mother and contributed about R1 000.00 to the household per month. He further contributed to his brother's schooling.

26.5. The Appellant had a medical condition due to an injury with a screwdriver in 2003 which required an open-heart operation. He also gave evidence to the effect that he still suffered pains when cold at night. However, the Court *a quo* wrongly found that the Appellant's health situation was not a serious issue because it already happened in 2003 and the accused appeared healthy to the Court;

26.6. The Appellant was a first offender but the Court *a quo* held that the Criminal Law Amendment Act prescribes a minimum sentence even for a first offender;

26.7. The Appellant had been in custody since 12 August 2016 to the date of sentencing (7 June 2018) but the Court *a quo* held that was not substantial and compelling.

[27] The Court *a quo* found the fact that the Appellant followed the complainant to her house where she was sleeping and broke into her place of refuge as aggravating.

[28] The Court *a quo* further correctly found that the complainant was a vulnerable person as defined in the Act, because she was woman and a disabled person. It is also so that the fact that the Appellant came into the complainant's home with a knife, took advantage of her disability, put her down and raped her three times is aggravating in the extreme.

[29] Although the Court *a quo* analysed the approach adopted by the Courts in circumstances such as the present, and referred to a series of judgments it did not sufficiently engage with test set out in *Dodo* and *Vilakazi*.

[30] More particularly, there was no engagement with the central question of whether the prescribed minimum sentence of life was disproportionate in the circumstances of the case. It is to that question that I now turn.

[31] The approach to minimum sentences ordained by the legislature as set out in *S v Malgas* 2001(1) SACR 469 SCA is that the specified sentences are not to be departed from lightly of for *'flimsy reasons'*, and that matters such as *'undue sympathy'* or *'aversion to imprisonment of offenders'* are to be excluded. That said, the Supreme Court of Appeal explained this comment in *S v Swart* 2004 (2) SACR 370 (SCA) at paragraph 17 by stating that the Court did not intend to suggest that the quality of mercy, an intrinsic element of civilised justice, should be altogether overlooked, but rather meant to emphasize that retribution and deterrence will come to the fore in relation to such crimes. It of course does not follow that simply because the circumstances attending a particular offence result in it falling within one or the other of the categories delineated in the Criminal Law Amendment Act, a uniform sentence must or should be imposed. (See *S v Mahomotsa* 2002 (2) SACR 435 SCA). The Court *a quo* was enjoined to consider whether substantial and compelling circumstances exist which justify a departure from the prescribed minimum sentence of life imprisonment.

[32] It is clear from the evidence that the offences of which the accused has been convicted are indeed serious offences, both in their very nature and by virtue of the policy indications which are set out in s 51 of the Criminal Law Amendment Act, to which the Court should have regard. In *S v Chapman* 1997 (3) SA 341 (A), the

Court recognised that rape is a very serious offence, is humiliating, degrading and a brutal invasion of privacy, dignity and person of the victim. Mahomed CJ said at 345A-B that:

> "The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.
>
> Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and entertainment, to go and come from work, and enjoy the peace and tranquillity of their homes without the feat, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[33] The Appellant violated those rights. His conduct is exacerbated by the fact that he knew that the complainant would offer very little resistance as she partially paralysed. He entered her home without her consent and raped her, not once, but thrice whilst threatening her with a knife. Moreover, the complainant in her evidence was aggravated by the fact that the Appellant was her […]'s boyfriend and was younger than her (the complainant). His conduct was grave and callous.

[34] Whilst the gravity and callousness of the offences with which the Appellant has been convicted cannot and should not be understated, it remains to be said that justice is always blended with a measure of mercy. According to the record, this was the Appellant's very first brush with the law. Prior to his incarceration, he was employed and was contributing towards the maintenance of his children and family. Although there is very little information concerning his heart condition, it remains to be said that he does have a health issue. He is relatively young and had spent a considerable period spent in custody awaiting trial. The period spent in custody by a prisoner is a factor to be taken into account in determining that circumstances exist such that a minimum sentence may be departed from. There is no rule as to how to determine what weight is to be given to that period. Each case must be decided having regard to all circumstances that justify a lesser sentence. (See *DPP v Gcwala* (295/13) [2014] ZASCA 44 (31 March 2014).

[35] I find that the Appellant's personal circumstances should have persuaded the Court *a quo* to find that there are substantial and compelling circumstances and as such the sentence of life imprisonment imposed on him is therefore disproportionate. In my view, the Appellant ought to be sentenced to a lengthy term of imprisonment. As such, I propose that the Appellant's appeal be upheld and his sentence set aside and be replaced with a sentence of twenty years imprisonment.

[36] In the result, the Appellant's appeal against sentence is upheld. The sentence imposed by the Court *a quo* on 7 June 2018 is set aside and replaced as follows:

(a) The Appellant is sentenced to 20 years imprisonment.

(b) The sentence is antedated to 7 June 2018.

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H J DE WAAL AJ

Acting Judge of the High Court

Cape Town

22 March 2019

I concur.

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NDITA J

Judge of the High Court

Cape Town

22 March 2019

APPEARANCES

Appellant's counsel: Ms S Kuun

Appellant's attorneys: Legal-Aid South Africa

Respondent's counsel: N Mbewana
Respondent's attorneys: Office of the Director of Public Prosecution: Western Cape