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

Case number: A89/2021

In the matter between:

LUVO PHALISO Appellant

and

THE STATE Respondent

JUDGMENT

(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 2 June 2021)

NEL AJ:

1. On 7 September 2020 the appellant, who pleaded not guilty, was convicted as charged in the Strand regional court on one count each of rape and kidnapping. He was sentenced on 23 November 2020 to life imprisonment in respect of the count of rape and 10 years imprisonment, to run concurrently with the aforementioned life sentence, in respect of the count of kidnapping.

2. Given that the appellant was sentenced to imprisonment for life by the trial court under section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the Act"), the appellant noted this appeal against his conviction and

sentence without having to apply for leave to do so, as he was entitled to do in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 ("the CPA").

3. The appellant however abandoned his appeal in respect of his conviction and only pursues the appeal against his sentence.

4. On 30 April 2017 the complainant had left Umtata tavern in Lwandela, where she was with her friends, and went to a Somalian shop in order to purchase chewing gum. There she encountered the appellant who grabbed her on her wrist with one hand and also pulled her by the front of her clothing with the other hand. A struggle ensued and the appellant dragged the complainant away from the street towards a passage which was approximately 10 to 12 metres away. During this struggle the appellant slapped the complainant three or four times in her face. She unsuccessfully attempted to escape from him. He told her to undress herself and when she refused to do so, the appellant took a knife out of his pants pocket and stabbed her on her lower left arm. The struggle continued and the appellant then drew a firearm and placed it on the complainant's forehead. He thereafter hit her on the forehead with the firearm and proceeded to undress her, took off her underwear and told her to bend forward and he raped her, without a condom, by placing his penis into her vagina from behind. The accused thereafter got dressed and told the complainant to dress herself. He instructed her to go with him to a friend's house, approximately 5 metres away, in order for her to wash off. The friend was however not at home. The appellant then told the complainant that

he was going to kill her as he was afraid that she would speak out about the rape and he did not want to find himself in prison. The complainant then begged and pleaded with the appellant and they walked to a street where she saw a friend outside of a house. She ran into the house and informed them to call the police. The brutality of this rape was also confirmed by Dr. Adelle Sterley who examined the complainant at Somerset West Hospital. She confirmed that the complainant had a 2cm x 2cm abrasion on her forehead, a swollen left cheek, a swollen bottom lip, and her left arm had two jagged lacerations one of 0.5cm and another of 1cm. The complainant moreover had various vaginal tears.

5. Regarding sentence, in the present matter the provisions of sections 51(1) read with 51(3) of the the Act are applicable. In terms of Schedule 2 Part 1 to the Act the rape count attracts the minimum sentence of life imprisonment as it was committed whilst involving the infliction of grievous bodily harm as set out above. The court may deviate from such sentence if it finds that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

6. In the present matter, after considering the evidence submitted in mitigation, the trial court found that there were no substantial and compelling circumstances present justifying a deviation from the prescribed minimum sentence and imposed a term of life imprisonment in respect of the charge of rape.

7. In *S v Malgas* 2001 (1) SACR 469 (SCA) at para [22] to [25] the court set out the approach to be taken in assessing the existence of substantial and compelling circumstances for the purposes of section 51 of the Act. The judgment made clear that, although the legislature ordained that the prescribed minimum sentences are to be regarded as "ordinarily appropriate" in the absence of weighty justification to the contrary when crimes of the kind specified are committed, an individualized response to sentencing a particular offender has not been dispensed with by the Act. Accordingly, if a court is satisfied for objectively convincing reasons that the circumstances of a particular case render the prescribed sentence unjust, that is disproportionate to the crime, the offender and the legitimate needs of society, it is entitled to characterize them as substantial and compelling. This has subsequently been referred to as the "determinative test".

8. The Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC) at para [40] approved the approach set out in Malgas as "undoubtedly correct".

9. In *S v Vilakazi* 2009 (1) SACR 552 (SCA) the court at para [18] stated:

> *It is plain from the determinative test laid down by Malgas, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in Dodo, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. 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. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs, it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of Malgas and Dodo is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.

10. The court emphasized that rape is a repulsive crime, humiliating, degrading and brutally invasive of the privacy, dignity and person of the victim, but continued to say at para [3]:

But the Constitutional Court reminded us in S v Dodo that punishment must always be proportionate to the deserts of the particular offender – no less but also no more – for all human beings "ought to be treated as ends in themselves, never merely as means to an end".

11. The appeal court's judgment in *S v SMM* 2013 (2) SACR 292 (SCA) is also instructive. I thus quote extensively from that judgment as follows:

[14] Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The

concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continue unabated. In S v RO, I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of the sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within a family context. If anything, the picture looks even gloomier now, three years down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge – the other sentencing objectives, including rehabilitation, can never be discarded altogether, in order to attain a balanced, effective sentence. The much quoted Zinn dictum remains the leading authority on the topic. Rumpff JA's well-known reference to the triad of factors warranting consideration in sentencing, namely the offender, the crime and the interests of society, epitomises the very essence of a balanced, effective sentence which meets all the sentencing objectives…

[17] It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way…

[18] The second self-evident truth (albeit somewhat contentious) is that there are categories of severity of rape. This observation does not in any way whatsoever detract from the important remarks in the preceding paragraph. This court held in S v Abrahams that 'some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust'. The advent of minimum sentence legislation has not changed the centrality of proportionality in sentencing. In Vilakazi Nugent JA cautioned against the danger of heaping 'excessive punishment on the relatively few who are convicted in retribution for the crimes of those who escape or in the despairing hope of that it will arrest the scourge'. He also pointed to the vast disparity between the ordinary minimum sentence for rape (10 years imprisonment) and the one statutorily prescribed for rape of a girl under the age

of 16 years (life imprisonment) and the startling incongruities which may result.

[19] Life imprisonment is the most severe sentence which a court can impose. It endures for the length of the natural life of the offender, although release is nonetheless provided for in the Correctional Services Act 111 of 1998. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, to the offender and the interests of society, would justify the imposition of a lesser sentence than the one prescribed by law. As I will presently show, the instant case falls into this category. This is evident from the approach adopted by this court to sentencing in cases of this kind.

12. In *S v Calvin* 2014 JDR 2020 (SCA) the appellant, a 20 year old first offender who had been in custody awaiting trial for seven months, was convicted of the rape of a six year old girl. He offered her sweets and chips when she was on her way from school. After she refused them, the appellant grabbed her and dragged her into a nearby orchard where he undressed and raped her. Her cries were overheard by a young man and when the appellant saw him he stopped raping the complainant and left. He handed himself over to the police

the next day when he heard that they were looking for him. He was sentenced to life imprisonment.

13. The appeal court, in setting aside the life imprisonment and replacing it with one of 20 years imprisonment, stated:

> *[17] The rape of a girl of six years is always a very serious crime… It is fortuitous that the rape was interrupted otherwise her injuries might have been much more serious and the psychological harm might have had a more severe impact if the attack was prolonged…*
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> *[20] The appellant is considered to be a first offender and was in custody for seven months before being sentenced. There was no gratuitous violence in addition to the rape. The aggravating factors that are taken into account are the age of the complainant, the fact that the appellant tried to entice her by offering her sweets and chips and when that did not work, he grabbed and dragged her into the orchard whereupon he raped her. It must have been a terrifying experience as is evident from her screams and the fact that the complainant distrusted the appellant even before he raped her. The appellant violated a young innocent girl and invaded her person without regard to her privacy, dignity and bodily integrity.*

[21] However, it should be remembered that "…Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound". I am of the view that a severe sentence is appropriate, taking into consideration all of the circumstances of the offence. But the youthfulness of the appellant as a first offender, the time he has spent in custody prior to being sentenced and the possibility of rehabilitation are of paramount importance in assessing the proportionality of the sentence to the offence.

[22] Life imprisonment in my view would be disproportionately harsh in the circumstances.

14. Before returning to the facts of the present matter, I am in agreement with the remarks expressed by Cloete J in an unreported judgment, delivered by a full bench in this division,[1] that it cannot be sufficiently underscored that rape is a reprehensible crime which shows no sign of abating in this country. Its seriousness and the total disregard displayed by perpetrators for the constitutionally entrenched rights of their victims must be given their full weight in every sentencing procedure.

15. However, in *S v Motloung* 2016 (2) SACR 243 (SCA) Victor AJA held at para [7] and [8] that an appellate court may interfere with the exercise by the

[1] See *Mtotywa v The State* (WCHC, case no: A423/2016) Cloete J (Bozalek and Binns-Ward JJ concurring) delivered on 8 August 2017 at para [35].

sentencing court of its discretion, even in the absence of a material misdirection, if the sentence is disproportionate to the crime.

16. In the present matter, one witness was called by the State during sentencing and that was Mr. Smith, who was the probation officer. No witnesses were called on behalf of the appellant.

17. Mr. Smith's evidence was that the appellant had admitted raping the complainant on two occasions. This was conceded by the appellant's legal representative during argument. Mr. Smith's evidence was further that the appellant showed no remorse and interacted with him in a nonchalant manner. Mr. Smith also testified that the incident has had a major impact on the complainant who had stated that she was contemplating suicide "if the system failed her".

18. The mitigating factors presented on behalf of the appellant are that he is the father of two minor children, although both reside with each of their biological mothers, he is a first offender, and was only 21 years of age at the time that the offence was committed, and he had been in custody for approximately 3 years when sentencing was argued.

19. The aggravating factors on the other hand are the appellant's lack of remorse, that he was not gainfully employed at the time of his arrest, although he is a first offender, he openly gave evidence about his unlawful possession of a firearm on the day in question albeit that he was not charged with such an

offence. Furthermore, the appellant had kidnapped the complainant prior to raping her and made use of extraneous violence whilst committing the offences. The trial court therefore correctly found that this was a brutal rape. It has also had a significant negative impact on the complainant in that she is now fearful of men and has stated that she would contemplate suicide "if the system failed her". The appellant, moreover, despite later admitting to Mr. Smith that he had raped the complainant, put her through the unnecessary secondary trauma of a trial in which she was portrayed as being a liar.

20. However, when considering an appropriate sentence one cannot lose sight of the fact that the appellant was only 21 years of age at the time that he committed the offence, he is first offender, and a father of two minors. Despite not showing remorse, he did eventually admit to raping the complainant. Moreover, he had spent almost 3 years in prison at the time of his sentencing. It is trite that it is appropriate to bring the period of imprisonment spent awaiting trial into account in imposing a custodial sentence. See in this regard the matter of *Radebe and Director of Public Prosecutions North Gauteng, Pretoria v Gcwala and Others* 2014 (2) SACR 337 (SCA) at para [15] to [19] and *S v Ngcobo* 2018 (1) SACR (SCA) 479 at para [21]. The appellant, given his relative youthfulness, is capable of being rehabilitated back into society.

21. Having regard to the decisions of the Constitutional Court and Supreme Court of Appeal to which I have referred (and by which we are, of course, bound) it is my view that these mitigating factors constitute substantial and

compelling circumstances to permit a deviation from the prescribed minimum sentence.

22. A substantial sentence of 25 years imprisonment seems to me to be sufficient to bring home the gravity of his offence and to exact sufficient retribution for his crime. To make him pay for it with the remainder of his life would seem to me to be grossly disproportionate.

23. In the result, I propose the following order:

i. The appeal against the sentence of life imprisonment in respect of count 1 is upheld.

ii. The sentence imposed upon the appellant on 23 November 2020 in respect of count 1 is set aside and replaced with the following:

> "***The accused is sentenced to 25 years imprisonment in respect of count 1, antedated, in terms of section 282 of the Criminal Procedure Act, to 23 November 2020***".

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NEL AJ

HENNEY J:

I agree and it is so ordered.

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HENNEY J