THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY: JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Director of Public Prosecutions, Free State v Mokati (440/2019) [2022] ZASCA 31(25 March 2022)

Today the Supreme Court of Appeal (SCA) handed down a judgment in an appeal against the decision of the Free State Division of the High Court of South Africa, Bloemfontein (the trial court), dismissing the appeal by the Director of Public Prosecutions, Free State (the State), the appellant, on the questions of law reserved; Mr Mokati's (the respondent's) cross- appeal against his conviction and sentence; upholding the State's appeal against the sentence of 10 years imprisonment on the count of rape and substituting it with a sentence of 18 years imprisonment. The sentence of 15 years' imprisonment for robbery with aggravating circumstances was ordered to run concurrently with the 18-year jail term for rape.

The respondent faced three counts, rape (count1), robbery with aggravating circumstances (count 2) and murder (count 3). The trial court found that Ms AM (the deceased) was alone at her workplace on 9 February 2017 when the respondent entered the premises armed with a knife. He forcibly raped the deceased after subduing her by threatening her at knifepoint. He penetrated the deceased in different positions at various places within the office. First, he penetrated her vaginally on a chair; secondly, he made her lean on a table and penetrated her; thirdly, he pushed her on her knees on the carpet and again penetrated her, and fourthly, when his penis slid out, he turned her on her back and penetrated her. A clinical forensic nurse testified that the deceased had reported vaginal and anal penetration. After the rape, the respondent took the deceased's electronic devices: a cellular phone, a laptop computer, a tablet computer and accessories. He threatened to kill her and her family if she reported the incident to the police. The deceased was examined by Dr De Lange, who prescribed her broad-spectrum antibiotics that prevent and treat sexually transmitted diseases. She was also examined by the forensic nurse, who gave her post-exposure treatment to prevent infection and some hormonal pills. From 9 February 2017, for the treatment of, amongst others, acute stress, anxiety, panic attacks, convulsion, several medicines were prescribed for the deceased by a number of medical practitioners. She died 14 days later following the rape. The cause of death was recorded as cerebral venous sinus thrombosis.

The trial court convicted the respondent of rape (count 1) and robbery with aggravating circumstances (count 2) and sentenced him to 10 and 15 years' imprisonment, respectively. It further ordered that five years of the prison term for rape would run concurrently with the sentence on count 2. The respondent was acquitted of murder (count 3).

Before the SCA, the State appealed against the sentence imposed on the respondent for rape. It also reserved questions of law in terms of s 319(1) of the Criminal Procedure Act 51 of 1977 (CPA) in respect of the acquittal of the respondent on the count of murder. It contended that the competent verdict of culpable homicide ought to have been returned. The respondent cross-appealed against his conviction and sentence in respect of the rape and robbery counts.

The SCA first considered the cross-appeal by the respondent against his conviction on the rape and robbery counts. During his trial he contended that the sexual intercourse was consensual and that he

took the deceased's belongings as a form of security for an amount of R1500 that the deceased allegedly owed him. Following a brief analysis, the SCA found that the overall evidence presented by the State portrayed a picture that was consistent and probable that the respondent had raped the deceased. On the count of robbery there were inherent improbabilities in the respondent's version. It was illogical that the deceased would give him very valuable items as security for a debt of only R1 500. Accordingly, so held the SCA, the trial court was correct in convicting the respondent on these two counts. Therefore, it dismissed his cross-appeal.

The SCA then considered the appeal by the State on the questions of law reserved on the count of murder in respect of which the respondent was acquitted. The State argued both in the trial court and in the SCA that the respondent ought to have been found guilty of culpable homicide in that had he not raped the deceased, she would not have had to take different kinds of medication. The trial court had found that the use of different medications could have independently caused the sagittal venous thrombosis. It concluded that the respondent 'could not have foreseen' the chain of events that ultimately led to the deceased's death and acquitted him.

In broad outline the questions of law came down to this: whether was it correct in law for the trial court to have found that there was no causal link between the rape and/or aggravated robbery and the death of the deceased; whether 'the legal principles underlying the element of causality were properly considered and applied'; whether the evaluation of expert evidence was correct in law; and whether was it correct for the trial court not to have considered the competent verdict of culpable homicide.

The SCA held that the question whether was it correct for the trial court to have found that there is no causal link between the rape and/or aggravated robbery and the death of the deceased was a factual enquiry which would involve the evaluation of evidence to determine whether the rape was the operative cause of death. The conclusion reached by the trial court was not one of law. On the evaluation of the expert evidence- the SCA held that dealing with the evidence in a fragmented fashion would amount to a misdirection of fact, not that of law. So too, ignorance of the evidence or a lack of appreciation for its relevance are questions of fact, not of law. Concerning the argument that the respondent ought to have been found guilty of culpable homicide – it held that even on the most liberal construction of the questions posed by the State it took the matter no further because the trial court and the State had failed to identify the facts that would have to be considered for purposes of answering those questions. The generalised findings on the evidence of the experts, upon which the professed points of law were predicated, suffered deficiencies. The trial court's findings ought to have been explicitly delineated and fully set out in the record. Consequently, the State's ground of appeal under s 319 (1) of the CPA had to fail.

Lastly, the SCA dealt with the appeal and cross-appeal against sentence on the count of rape. The State contended that the prescribed minimum sentence of 10 years' imprisonment in terms of s 51(2)(*b*) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) read with Part III of Schedule 2, imposed on the respondent for rape, was shockingly lenient and inappropriate. It argued that the respondent had raped the deceased in four different positions and at three different places in the office. Therefore, the multiples acts of rape called for life imprisonment in terms of s 51(1) of the CLAA. The trial court had found the rape to have been a single continuous act which fell within the purview of s 51(2)(*b*). The SCA held that it was impermissible for the State, on an appeal against the sentence, to seek a reversal of the trial court's finding on issues having a bearing on the conviction without having sought leave against the conviction through a reservation of a point of law on them. In light of this, it was not open to re-evaluating whether there had been multiple acts of rape.

On the State's further argument that the minimum sentence imposed was inordinately light because of a number of aggravating circumstances which, it submitted, were not properly considered by the trial court, in a split decision – the majority of the SCA stated the position as follows: First, Parliament has legislated a minimum sentencing regime in respect of particular crimes to reflect the seriousness with which such offences should be considered by the courts when imposing a sentence. Second, this legislative regime imposes a minimum sentence, absent substantial and compelling circumstances. The presence of such circumstances requires the downward revision of the sentence below the prescribed minimum, so as to ensure that sentencing is not rendered disproportionate, and hence unconstitutional. Third, a prescribed minimum sentence does not prevent a sentencing court from imposing a sentence above the prescribed minimum, if a careful consideration of all the factors relevant to the imposition of a fair and proportionate sentence warrants a sentence above the prescribed minimum. Fourth, the

sentencing court's discretion to determine the correct sentence is not constrained by the requirement that it must find substantial and compelling circumstances before a sentence is imposed that is above the prescribed minimum. That would entail a minimum sentence being a presumptive sentence, which it is not. The sentencing court will take account of the fact that the prescribed sentence, at a minimum, reflects the gravity that Parliament attaches to the crime. However, the variability of crimes and the offenders who commit crimes is legion. Hence, the sentencing court, if it considers that the crime warrants a sentence above the prescribed minimum, should exercise its discretion to do so, taking account of the guidance provided in *Malgas* and the overarching constitutional constraint of proportionality. Fifth, if an appellate court considers that the sentencing court has failed to impose a sentence above the prescribed minimum when it should have done so, the appellate court may only intervene if the imposition of the prescribed minimum sentence is grossly disproportionate.

Having regard to the cumulative effect of all the circumstances and the serious aggravating features of the case - as set out in the judgment – the majority held that the trial court could not reasonably have imposed the sentence that it did. In addition, the minimum sentence imposed in terms of s 51(2)(*b*) of the CLAA was 'disturbingly inappropriate' and markedly out of kilter with the sentence it would have imposed. It further held that 18 years' imprisonment for rape would best serve all the objectives of punishment. In the result, it upheld the State's appeal.

As to the respondent's cross-appeal, the SCA found his argument, that the trial court erred in not finding substantial and compelling circumstances present which merited a deviation from the imposition of the prescribed sentence under s 51(2)(*b*) of the CLAA, not to have carried any persuasion and thus dismissed it.

The dissenting judgment would have dismissed the State's appeal against the sentence. It held that where a minimum sentence is prescribed in the Act, it was not enough for a court to simply invoke its 'inherent jurisdiction' to deviate from the prescribed minimum sentence and impose a higher one. There must be an objective and juridical basis to ensure that the sentencing is not undertaken on an undefined basis, and influenced by a particular judicial officer's subjective views as to what is appropriate. In addition, it held that by prescribing minimum sentences in respect of particular offences, the legislature set a benchmark against which minimum sentences must be considered. Accordingly, when a court imposes a sentence higher than the prescribed minimum sentence, it must bear in mind that the legislature has ordained the prescribed sentences as guidelines. Thus, where there is a deviation from the prescribed minimum sentences, either downward or upward, the extent of the deviation requires justification, given what the legislation has stipulated. The greater the deviation the greater the burden of justification. It further held that none of the aggravating factors presented in this case, either individually or cumulatively with others, constituted a basis for a higher sentence. They were inherent in most rapes and their presence was already reflected in the 10 years' prescribed minimum sentences decreed in s 51(2) of the CLAA. Held that the sentence of 10 years' imprisonment imposed by the trial court was not such that no court acting reasonably, would have imposed it. Consequently, a sentence of 18 years' imprisonment was wholly disproportionate.

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