THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1400/2016

In the matter between:

MHLANGANISI GCAZA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Gcaza v The State* (1400/16) [2017] ZASCA 92 (9 June 2017)

Coram: Maya AP, Zondi and Dambuza JJA, Gorven and Mbatha AJJA

Heard: 8 May 2017

Delivered: 9 June 2017

Summary: Evidence: what constitutes sufficiency of circumstantial evidence: conviction based on circumstantial evidence well-founded: cross-appeal: finding of substantial and compelling circumstances justifying sentences lesser than the minimum sentences prescribed by statute not constituting misdirection.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Makaula J sitting as court of first instance):

1. The appeal against the convictions is dismissed.
2. The cross-appeal against the sentences is dismissed.

JUDGMENT

Mbatha AJA (Maya AP, Zondi and Dambuza JJA and Gorven AJA concurring):

[1] The appellant was convicted by the Eastern Cape Division of the High Court, Grahamstown on 29 March 2016 of one count of rape and one count of murder. He was sentenced to undergo 23 years' imprisonment in respect of each count and the sentences were ordered to run concurrently. With leave of the high court, the appellant appeals against both convictions. The respondent was also granted leave to cross-appeal against the sentences. The provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 applied to both counts.

[2] The incident giving rise to the conviction and sentence arose from the discovery of the body of the deceased, a six year old boy at Ezibeleni Street in Lingelihle Township, Cradock. The post-mortem examination revealed that the deceased had been anally raped and died as a result of multiple stab wounds and ligature strangulation.

[3] The appeal turns on the quality and sufficiency of the circumstantial evidence upon which the trial court convicted the appellant. In the cross-appeal the respondent contends essentially that the trial court had misdirected itself in concluding that there existed substantial and compelling circumstances which justified the imposition of lesser

sentences than the prescribed minimum sentences. Counsel for the appellant, on the other hand, argued in support of the correctness of the trial court's finding in respect of the substantial and compelling circumstances and submitted that the sentences were in order.

[4] On the morning of 20 January 2015 Sergeant Andile Klaas (Klaas) received a call to attend to a crime scene at Lingelihle Township in Cradock, where the deceased's body had been found by members of the community. In close proximity to the body, a blue cooler bag containing a transparent plastic bag was also found. At the scene of the crime Klaas was informed that the appellant was a suspect and was directed to his home. Klaas then proceeded to the appellant's house. As he approached the appellant, members of the community became agitated and threw stones at the appellant. It was then that Klaas took him to the police station. He says that this was done to protect the appellant from members of the community.

[5] The respondent led the evidence of the appellant's aunt, Ms Maria Gayi (Gayi), who lived with him at the time of his arrest. Gayi testified that the appellant, who permanently lived in Cape Town, had arrived in Lingelihle on 8 January 2015. He occupied his mother's house which was behind her house. He brought with him raw and cooked fish in a cooler bag. Gayi cleaned the cooler bag and put it on the hi-fi music system in the lounge, where it remained until removed by the appellant on 18 January 2015. She described the cooler bag as blue in colour and that it was the type that could be folded up. She identified the cooler bag as the one appearing in photo 17 of Exhibit D by its colour and the logo inscribed on it. Gayi testified that she had also joined in the search for the deceased. Upon her return from the search Gayi found the appellant in her home. He appeared to be in state of shock, and enquired from her if the police had left. The appellant spent the night in her house, as he had done on the previous night on the pretext that he was afraid to sleep alone.

[6] On 21 January 2015, a day following the arrest of the appellant, Gayi accompanied police officers to a location where she identified a blue cooler bag as the

bag brought by the appellant to her home. When she was cross-examined, it was suggested to her that the appellant did not bring the fish in the cooler bag or even bring a cooler bag, but brought it in a container, which version was denied by Gayi.

[7] Adonis testified that in the early afternoon of the day before they learnt of the disappearance of the deceased, she had observed from her home the appellant taking something out of a blue cooler bag and placing it in a newly dug hole. The appellant removed it from the hole and placed in the cooler bag and thereafter walked away.

[8] Warrant Officer Gregory Pitt (Pitt) corroborated the evidence of Klaas regarding the arrest of the appellant. He also testified that after arresting the appellant, he removed the following items of clothing from the appellant: a pair of takkies, a white linen hat and a pair of trousers. He booked the items in the SAP 13 register, packed them in an evidence bag, and delivered it to the forensic laboratory in Port Elizabeth. The forensic bag bore the serial number PAD000889338.

[9] When recalled after, Pitt explained to the court that the cooler bag recovered at the scene had been misplaced and what steps he took to trace a cooler bag similar to the one in Exhibit D. The cooler bag in Exhibit D bore the logo, 'Department of Environmental Affairs, Republic of South Africa Marine Week 10.' Pitt's evidence is that no blue coloured bag could be found, but an identical bag in a green colour was found at the Waterfront in Cape Town. It was handed in as Exhibit 1. Despite a search, no cooler bag was found in the appellant's possession or in his premises.

[10] Mr Charles Ludick (Ludick) testified as to how he found the blue cooler bag, which contained a blood stained, transparent plastic bag under a pile of stones near JJ's spaza shop, having been drawn to it by barking dogs. This was reported to the police, who took over the scene.

[11] Warrant Officer Michelle Baard (Baard) attached to the Biology Unit of Forensic Science Laboratory, a Forensic Analyst and a Reporting Officer, testified that she

received DNA evidence for interpreting and analysis relating to CAS 265/01/2015 Cradock. The case files were received on 9 July 2015 and 18 September 2015 bearing lab numbers 23067/15, 69683/15, 23067/15, 69683/15, and 184121/15 respectively. Her findings were tabulated in an affidavit deposed in terms of ss 212(4)*(a)*, 6*(a)*, 6(*b*) and 8*(a)* of the Criminal Procedure Act 51 of 1977 (CPA), which was handed in as Exhibits B and C.

[12] The first report in Exhibit B, compared the sample to the 'hat', reference number PAD000889338, to the control sample, reference number 13DBAA0532EP, Nogaga Inganathi, the deceased. The result as summarised in para 4.1 of Exhibit B, stated that PAD000889338 matched the DNA result in the control sample reference 13DBAA0532EP, Nogaga Inganathi ─ the most conservative occurrence of the DNA result being one in eight billion people.

[13] The second report in Exhibit C compared an analysis and evaluation of a swab marked 'from the plastic bag' reference number 14DCAH7816, to the control sample reference number 13DBAA0532EP, Nogaga Inganathi. In this regard, the result as stated in para 4.1 of Exhibit C stated that the DNA result from the plastic bag swab, 14DCAH7816 matched the reference sample 13DBAA0532EP, Nogaga Inganathi. Again, the most conservative occurrence for this DNA result was one in eight billion people. Baard's evidence was unchallenged by the appellant and the affidavits were handed in by consent.

[14] Dr Johan de Beer (de Beer) conducted a post-mortem examination on the body of the deceased. He collected swabs from the buccal cells and also from the anal area of the deceased. These were done by using the sample collection kit number 13DBAA0532 which was sealed inside the forensic bag PA5002109742. The sealed forensic bag was handed over to Pitt. De Beer confirmed sexual assault on the deceased and also the cause of his death.

[15] Constable Bonolo Mohlokonya (Mohlokonya) testified as to the collection of evidence at the crime scene, including the taking of photographs and swabs. The exhibits were all placed in forensic bags and entered in the SAP 13 register. These were dispatched to the Forensic Laboratory in Port Elizabeth under the cover of a minute dated 23 January 2015. Evidence bag number PA4002148A24 contained swabs marked A and B from the plastic bag. The evidence bag number PA4002148AD228 contained swabs A and B for possible blood inside the cooler bag. All the forensic bags were sealed and placed in exhibit bag number PAD000091508 and despatched to the forensic laboratory in Port Elizabeth. The respondent handed in, by consent, the affidavits deposed in terms of s 212 of the CPA by the forensic analysts in Port Elizabeth and Cape Town.

[16] The appellant testified in his defence and denied knowledge of the alleged offences. He denied ever bringing a blue cooler bag to Cradock. The appellant denied that he owned a hat at all and that on the day of his arrest he was wearing one. However, under cross-examination he admitted that he in fact did own hats, one in black and the other yellowish with black stripes on it. Moreover, he could not explain why his aunt (Gayi), who looked after his welfare, would insist that he brought to Cradock the incriminating cooler bag which she identified as that in Exhibit D.

[17] The trial court accepted the evidence proffered by the state witnesses. It rejected the appellant's denial as not reasonably possibly true. The trial court accepted the evidence of Gayi that a cooler bag in which a blood-stained plastic bag, which contained the deceased's DNA was found, was the cooler bag which the appellant had brought to her house. It made credibility findings in respect of Gayi and concluded that there was no reason to reject her evidence. The trial court also accepted that the hat which was removed from the appellant by Pitt on his arrest contained the deceased's DNA. It accordingly convicted him of both counts on the basis of that evidence.

[18] Counsel for the appellant contended that the trial court misdirected itself by finding that the State had proved its case beyond reasonable doubt. She argued that

the circumstantial evidence on which the appellant was convicted was not sufficient to sustain the convictions.

[19] The issue on appeal is whether the State proved beyond a reasonable doubt that the appellant was guilty of the crimes with which he was charged.

[20] There are two uncontroverted pieces of evidence against the appellant. First, a plastic bag with the deceased's blood inside a cooler bag similar to the one he had brought with him from Cape Town. He removed his cooler bag from Gayi's house. Shortly before the discovery of the body of the child he was seen carrying his cooler bag. Secondly, a hat with the deceased's blood was one of the items sent for DNA testing, together with other clothing items not disputed to belong to the appellant. Further, the chain evidence given by Pitt, Baard, Dr de Beer and the s 212 affidavits handed in by consent were sufficient as proof of the chain evidence. There was no evidence that the seals of the sample bags might have been tampered with. To reject this evidence would require findings that the appellant's aunt lied about the cooler bag, that Pitt deliberately lied about the origin of the hat and submitted someone else's hat with the deceased's DNA to the lab for testing. The probabilities simply do not support that reasoning.

[21] I accept the credibility findings made by the trial court in respect of Adonis. She is not a member of the appellant's family to have been aware that appellant had brought a blue cooler bag from Cape Town. Moreover, the bag was only discovered a day after the arrest of the appellant. It was Adonis who had informed Klaas about the cooler bag prior to the discovery thereof. This cannot be said to have been a coincidence.

[22] The appellant seeks to challenge the chain evidence regarding the DNA evidence linking him to the crimes. One has to bear in mind that the cardinal rule is whether on a conspectus of the evidence as a whole, it was established beyond a reasonable doubt that the commission of the offences were committed by the accused. It is unacceptable that any possibility, no matter how far-fetched, should be elevated to

a defence in law, as there is a veiled suggestion for which no foundation was laid that the evidence may have been contaminated or that the wrong items were examined. It is my view that affidavits submitted in terms of s 212 are conclusive proof of the lack of any interference or contamination.

[23] The appellant's challenge to the evidence is in a piecemeal fashion. This court in *S v Reddy & others* 1996 (2) SACR 1 (A) at 8C-D warned against this, where it stated as follows:

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202-203, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn".'

[24] I am satisfied that the trial court's approach to the evaluation of the evidence was correct. It considered the totality of the evidence and, in that process, weighed the evidence of the State's witnesses against that of the appellant. As appears above, the appellant's evidence was also riddled with contradictions, regarding whether or not he owned a hat, or whether he wore a hat or if it was in his bag. Distancing himself from the blue cooler bag, which he had removed a few hours prior to the disappearance of the deceased, clearly indicates that he was not taking the court into his confidence. The trial court, in my view, rightfully rejected his evidence. He admitted that the deceased was known to him as one of the children from the neighbourhood.

[25] The sentiments expressed by this court in *S v Ntsele* 1998 (2) SACR 178 (SCA) are relevant, where it held that the onus rests upon the State in a criminal case to prove the guilt of the accused beyond reasonable doubt ─ not beyond all shadow of doubt. The court held further that when was dealing with circumstantial evidence, as in the present matter, the court was not required to consider every fragment of evidence

individually. It was the cumulative impression, which all the pieces of evidence made collectively, that had to be considered to determine whether the accused's guilt had been established beyond a reasonable doubt. Courts are warned to guard against the tendency to focus too intensely on separate and individual components of evidence and viewing each component in isolation. In the light of the evidence presented to the trial court, I am satisfied that on the conspectus of the evidence, the inference was correctly drawn that the appellant was guilty of the crimes with which he was charged. The appeal on conviction must therefore fail.

[26] I will now consider the cross-appeal. The respondent submits that the trial court misdirected itself in finding that there were substantial and compelling circumstances that justified the court's deviation from imposing the prescribed minimum sentences on the convictions. In both instances, the prescribed minimum sentence was life imprisonment.

[27] It is trite that a court will only interfere with a sentence if the trial court misdirected itself in passing the sentence. Moreover, a misdirection alone does not suffice for a court of appeal to interfere. A misdirection should be material, as expressed by Trollip JA in *S v Pillay* 1977 (4) SA 531 (A) at 535E-H. In *S v Malgas* 2001 (1) SACR 469 (SCA) para 12, this court stated that:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the 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. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate" . . . In the latter situation the appellant court is not at large in the

sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No limitation exists in the former situation.'

[28] I shall now turn to the reasons that informed the mind of the learned judge when he sentenced the appellant. He took into account the seriousness of the offences, that the deceased, a six year old child, was brutally raped and died from multiple stab wounds and strangulation. He stressed the effect and impact of these offences on the family of the deceased and the community of Ezibeleni Township in Cradock. A close-knit community which had *en masse* searched for the missing child, and which was not hesitant to take the law into its own hands when the appellant was fingered as the suspect. This showed the devastating effect of the incident on the community which had lost a child to a vicious crime. The viciousness of the offences upon an innocent child, ruthlessly raped and killed was not overlooked or minimised by the trial court.

[29] The trial court considered the personal circumstances of the appellant who was 23 years old at the time of sentencing. He was single and had no children. The appellant left school in grade 8. The court accepted the probation officer's report, which stated that for three days during the period in which the deceased was killed, the appellant was continuously using the methamphetamine (commonly known as tik). This was also supported by the evidence of Dr Hester Jordaan, a psychiatrist, whose evidence what that the appellant was diagnosed to have abused cannabis, methamphetamine and alcohol during the period that the deceased was killed. Dr Jordaan testified that the appellant suffered from what is known as an 'anti-social personality disorder'. She described this as not being a mental illness, but opined that such persons show certain personality traits, which become so severe that they impact 'on the person's social, occupational and interpersonal functions'. People who suffer from this disorder show a longstanding pattern of disregard for and the violation of the rights of others and they fail to conform to social norms with respect to lawful behaviour.

Her evidence was also that deceitfulness, irritability and aggressiveness are traits that indicate such a personality disorder.

[30] The respondent submitted that there is no treatment for such a disorder and that in fact, the appellant falls within the *locus classicus* of a psychopath. As a result of this condition there are no prospects of rehabilitation on the appellant and he remains a danger to society.

[31] Dr Jordaan's testimony was that 'a social personality disorder is not amenable to treatment'. She further stated that these individuals are extremely difficult to involve in any form of rehabilitation and that a vast majority of such individuals end up in correctional facilities. However, she stated that 'a related rehabilitation programme to improve their insight, anger management and impulsive control can be attempted which would minimise his co-morbid substance abuse and help him develop an insight into his condition'. It would be unsafe to draw inferences from the appellant's condition other than the ones drawn by the psychiatrist.

[32] The respondent, in pursuit of its argument, relies on the minority judgment in *S v Lawrence* 1991 (2) SACR 57 (A) which found that a person diagnosed with a severe personality disorder, should not be considered as a candidate for rehabilitation. The reliance on this minority judgment is misplaced as the majority found otherwise. The appellant in that case who was described as a psychopath, showed similar traits to the prognosis given by Dr Jordaan in respect of the appellant. Goldstone JA, writing for the majority, stated that '[i]t is not unreasonable, in our day, to nurture the hope that medical science may yet find a drug or procedure to control if not cure, this extreme kind of mental abnormality.' That was said in 1991. Dr Jordaan testified in 2015, where she affirmed that though there is still no cure for such conditions, a rehabilitation programme can be introduced to such persons as the appellant to improve their insight, anger management, and impulsive control. And that though the appellant had previously failed to continue with a rehabilitation programme, he had at least embarked on one and that such a programme would be very useful in attempting to manage future risk of offensive

behaviour. This factor, taken into account with the age of the appellant and his use of narcotic and intoxicating substances at the time, suggests that the appellant can be rehabilitated to a certain extent. It is my view that the trial court attached proper weight to the personal circumstances of the appellant and the expert evidence of Dr Jordaan. I am thus not persuaded that the trial court misdirected itself in finding the existence of substantial and compelling circumstances.

[33] The fact that the convictions fall within the ambit of the prescribed minimum sentence does not automatically result in a sentence of life imprisonment. The views expressed by Nugent JA in *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) para 18 are apposite in this regard:

'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* [*S v Dodo* 2001 (1) SACR 594 (CC)], 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 sentenced 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 of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.'

[34] Though the appellant was not a first-time offender, the trial court found that there was scope for rehabilitation. It accepted that he was under the influence of drugs and alcohol when the offences were committed. The trial court rightfully accepted these facts cumulatively as amounting to substantial and compelling circumstances.

[35] Without appearing to have over-emphasized the personal circumstances of the appellant I must emphasize that the crimes committed by the appellant were gross and inhumane. Rape is unquestionably a despicable crime. The enormity of this crime was

aggravated by the fact that it was committed against an unsuspecting young boy. In *S v D* 1995 (1) SACR 259 (A) this court said the following (at 260F-I):

‘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 do. . . . [The] appellant’s conduct in my view was sufficiently reprehensible to fall within the category of offences calling for sentence both reflecting the Court’s strong disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children.’

[36] It is my view, that there was no misdirection on the part of the trial court. It also cannot be said that the sentences imposed were startlingly inappropriate. There is no reason for this court to interfere with the sentences.

[37] Accordingly, I make the following order:

1. The appeal against the convictions is dismissed.
2. The cross-appeal against the sentences is dismissed.

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YT Mbatha

Acting Judge of Appeal

Appearances

For Appellant:	E Crouse (with him H Charles) Instructed by: Grahamstown Justice Centre Legal Aid, Grahamstown Bloemfontein Justice Centre, Bloemfontein
For Respondent:	N Henning Instructed by: The Director of Public Prosecutions, Grahamstown The Director of Public Prosecutions, Bloemfontein