THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 481/09

A A MAAKE Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Neutral citation: *Maake v Director of Public Prosecutions* (481/09) [2010] ZASCA 51 (31 March 2010)

Coram: NAVSA, MLAMBO, CACHALIA, MALAN AND TSHIQI JJA

Heard: 26 February 2010

Delivered: 31 March 2010

Updated:

Summary: Sentence ─ when maximum envisaged in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 is imposed it must be explained and motivated ─ factors justifying greater sentence must be clearly articulated and reasons why a departure from the minimum sentence is justified must be supplied.

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ORDER

On an appeal from: North Gauteng High Court (Pretoria) (Du Plessis J and Terblanche AJ sitting as a court of appeal):

1. The appeal against convictions is dismissed.

2. The appeal against sentence is successful to the extent reflected hereafter.

3 The order of the court below in respect of sentence is set aside and substituted as follows:

'The magistrate's order in relation to sentence is set aside and substituted as follows:

"(a) In respect of count 1 the appellant is sentenced to ten years' imprisonment.

(b) In respect of count 4 the appellant is sentenced to five years' imprisonment.

(c) Four years of the sentence set out in (b) is to run concurrently with the sentence referred to in (a)." '

(d) The sentence is antedated to 4 June 2002.

JUDGMENT

NAVSA and TSHIQI JJA (MLAMBO, CACHALIA AND MALAN JJA concurring):

[1] On 4 June 2002, the appellant, Mr Alex Aubrey Maake, was convicted by the regional magistrate, Benoni on one count of rape and on a further count of robbery. On the same day he was sentenced to 15 years' imprisonment on the rape count and to 5 years' imprisonment for the robbery. The magistrate did not order the two sentences to run concurrently. Thus, the appellant was sentenced to imprisonment for 20 years.

[2] The appellant appealed his convictions and sentence to the Pretoria High Court. The appeal against both convictions was dismissed. His appeal against sentence was, however, successful in part. The Pretoria High Court took the view that the cumulative effect of the sentence was such that it induced a sense of shock. The sentence of 20 years' imprisonment referred to in the preceding paragraph was replaced with one of 16

years' imprisonment — four years of the sentence on the count of robbery were ordered to run concurrently with the sentence of 15 years' imprisonment imposed on the count of rape.

[3] The appellant applied to the Pretoria High Court for leave to appeal his convictions and the related sentences to this court. It appears that owing to an oversight on the part of the Pretoria High Court it initially granted leave to appeal against convictions only.

[4] In debate before us on the merits of the convictions the question arose whether the 15 year sentence imposed by the magistrate in respect of the rape count was in accordance with the prescripts of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). This aspect will be dealt with in detail in due course.

[5] Subsequent to the issue being raised in argument the matter was postponed to enable the appellant to approach the Pretoria High Court afresh for leave to appeal in respect of sentence. Such leave has since been granted. Thus, we are dealing with an appeal against convictions and sentence. During the hearing before us, prior to the postponement, submissions were made concerning sentence. In addition, we have subsequently received written heads of argument on behalf of the appellant in respect of sentence.

[6] It is necessary to deal first with the convictions. It is true that in respect of the rape count the appellant was convicted principally on the evidence of a single witness, namely, the complainant. However, the magistrate had regard to the nature and quality of her evidence and that her version of events immediately after the alleged rape was corroborated in material respects by an independent witness. The magistrate carefully took into account the quality of the appellant's evidence. He found material aspects of the appellant's evidence improbable. An example is that the appellant testified that he had been falsely implicated because the complainant had become jealous as a result of an assumption she had made. The assumption was that he was talking on his cellular telephone with another woman whom he intended to see later that day. That testimony has to be contrasted with his other evidence that earlier they had communicated concerning their other relationships without any rancour.

[7] The magistrate took into account that immediately after the complainant had emerged from the veld where the rape had allegedly occurred she was seen in a state of shock and anxiety. She was also tearful. The person who saw her in this state testified and it is clear from his evidence that he was concerned about her well-being. The magistrate considered that when she was seen she was not in possession of any of her belongings. According to the complainant she was forced because of the rape to leave her possessions behind. The magistrate rejected the appellant's version of events.

[8] In our view, the magistrate approached the evidence cautiously and correctly and his reasoning in respect of the conviction on the rape count cannot be faulted.

[9] The count of robbery involved a different complainant. It was not contested that she had been in the appellant's car at material times. According to her, the appellant had dispossessed her with force of her cellular telephone, cash and a pendant. She ultimately regained possession of these items after wrestling with him. The complainant on this count was also a single witness. The magistrate, once again, carefully considered the nature and quality of her evidence. He found her a satisfactory witness and took into account that she had not exaggerated in communicating her version of events. The magistrate considered the appellant's own evidence that there had been a heated disagreement between them but rejected his version that she had grabbed the steering wheel whilst the vehicle in which they were travelling was in motion. The magistrate rightly found his version for the disagreement improbable.

[10] It is not necessary to say anything further concerning the magistrate's reasons for convicting the appellant on the count of robbery. Suffice to say that in this respect too his reasoning and conclusion are correct. I turn to deal with the sentence imposed in respect of the count of rape.

[11] At the time that the rape was perpetrated the appellant was a police reservist who had persuaded the complainant to accompany him to a function. However, he drove her into the veld and perpetrated the rape in his car. It does not appear that the complainant suffered any other serious physical injuries. At the time of sentencing, the appellant was 26 years old and unmarried with no children.

[12] In sentencing the appellant on this charge the Magistrate rightly stated that women in this country had to be protected against the scourge of rape. He referred, in general terms to the objects of the Act, namely, to provide minimum sentences for serious offences.

[13] The magistrate had regard to the minimum sentences prescribed for rape. The following comments by him are of importance:

'Verkragting is een van die misdrywe wat gelys is in die betrokke bylae tot die wet, en maak dit voorsiening vir 'n minimum vonnis van 10 jaar gevangenisstraf met betrekking tot die eerste aanklag, tensy die hof kan bevind dat daar wesenlike en dwingende omstandighede bestaan, wat die hof noop om 'n mindere vonnis op te lê.'

[14] Section 51 of the Act prescribes minimum sentences for rape in distinct categories. Section 51 (2)*(b)* provides:

'(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in ─

. . .

(b) Part III of Schedule 2, in the case of ─

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years;

. . .'[1]

[15] A proviso to s 51 (2) of the Act reads as follows:

'Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.'

[16] The appellant is a first offender. From the comments of the magistrate referred to in para 12 above, it appears that he was minded to impose the *minimum* sentence of ten years' imprisonment prescribed by s 51 (2)*(b)*(i) of the Act, but then proceeded to impose a sentence of 15 years' imprisonment, which if regard is had to the proviso referred to in

[1] Part III of Schedule 2 lists rape as an offence.

the preceding paragraph is the *maximum* sentence he could impose. The magistrate has, since leave to appeal against sentence was granted by the Pretoria High Court, provided further reasons for the sentence of 15 years' imprisonment imposed by him.

[17] It is necessary to quote parts of the further reasons provided by him:

'[D]it [was] onder my aandag gebring dat ek tydens vonnisoplegging na die Wet op minimum vonnisse 105 van 1997 verwys het. Ek het aangedui dat die voorgeskrewe minimum vonnis vir die eerste aanklag tien jaar gevangenisstraf is, maar voortgegaan en 'n vonnis van vyftien jaar gevangenisstraf opgelê.'

Later, the following is stated:

'Na die lees . . . van die getikte oorkonde is dit asof daar 'n gedeelte van die vonnis uitspraak weg is. Daarmee sê ek nie dat 'n gedeelte van die uitspraak nie getik was nie. Skynbaar is 'n gedeelte van my gedagtegang eerder nooit uitgespreek nie.

Ek sê dit omdat dit wat getik is, met verwysing na die minimum vonnis nie ooreenstem met die opgelegde vonnis nie. Ek was wel deeglik bewus van wat die minimum vonnis was; nie net het ek dit in my uitspraak genoem nie; 'n groot gedeelte van die sake op my hofrol hou verband met verkragting aanklagte en ek kan nie vir 'n oomblik dink dat ek per abuis 15 jaar gevangenisstraf opgelê het nie.'

[18] The magistrate states (almost eight years after the event) the following:

'Ek wil graag noem dat ek die saak goed onthou en selfs kan onthou hoe die tweede klaagster gelyk het. Laasgenoemde meld ek net ter stawing daarvan dat ek die saak en die feite herroep.'

The magistrate continues and states:

'Indien die gedeelte waarna ek verwys, gelees word, sal opgemerk word dat ek meld dat daar geen versagtende maar slegs verswarende omstandighede aanwesig was, en, daarna verwys ek na die wet op minimum vonnisse. Ek was bewus daarvan dat dieselfde wet bepaal dat die hof gemagtig is om 'n hoër vonnis as die voorgeskrewe minimum op te lê, tot 'n maksimum van vyf jaar gevangenisstraf meer as die voorgeskrewe minimum vonnis.

In die lig van wat ek reeds gesê het m.b.t verswarende omstandighede; is dit waarheen ek op pad was nl. Om van die ekstra vyf jaar strafjurisdiksie gebruik te maak. Dit was my gedagtegang. Dit was deurentyd my doel om die beskuldigde tot vyftien jaar gevangenisstraf op die eerste aanklag te vonnis.

Tydens vonnis oplegging het ek gedink dat ek reeds na die tersaaklike wetgewing verwys het, en het ek die beskuldigde derhalwe tot vyftien jaar gevangenisstraf gevonnis.'

[19] It is not only a salutary practice but obligatory for judicial officers to provide reasons to substantiate conclusions. The magistrate did not do so in respect of the maximum sentence imposed by him. In an article in *The South African Law Journal*[2] entitled 'Writing

[2] 115 (1998) pp 116-128.

a Judgment' former Chief Justice M M Corbett pointed out that this general rule applies to both civil and criminal cases. In civil cases it is not a statutory rule but one of practice. In *Botes & another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H-28A, this court held that in an opposed matter where the issues have been argued litigants are entitled to be informed of the reasons for the judge's decision. See also in regard to the obligation to provide reasons *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 171E-172C.

[20] When a matter is taken on appeal a court of appeal has a similar interest in knowing why a judicial officer who heard the matter made the order which he did. Broader considerations come into play. It is in the interests of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.[3]

[21] Before the matter was dealt with statutorily the same general rule of practice applied in criminal matters both in regard to conviction and sentence. In this regard see *R v Majerero & others* 1948 (3) SA 1032 (A) where, at 1033 the following appears:

'We are aware that there is no provision in the Criminal Procedure Code for the delivery of a judgment . . . but in practice such a judgment is invariably given and we wish now to say that it is clearly in the interest of justice that it should be given.'

See also *R v Van der Walt* 1952 (4) SA 382 (A) at 382H-383A and *R v Huebsch* 1953 (2) SA 561 (A) at 564G-565E.

[22] In *S v Immelman* 1978 (3) SA 726 (A) at 729B-D the following was said in respect of sentence:

'It seems to me that, with regard to the sentence of the Court in cases where the trial Judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does also serves the interests of justice. The absence of such reasons may operate unfairly, as against both the accused person and the State. One of the various problems which may be occasioned in the Court of Appeal by the absence of reasons is that in a case where there has been a plea of guilty but evidence has been led, there may be no indication as to how the Court resolved issues of fact thrown up by the evidence or on what factual basis the Court approached the question of sentence.'

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[3] *SALJ* op cit at 117.

[23] It bears mentioning that in the article referred to in paras 18 and 19 above the learned Chief Justice states that the practice of providing an order with reasons to be supplied later is one that should be used sparingly.[4]

[24] Section 146 of the Criminal Procedure Act 51 of 1997 now provides that a judge presiding in a 'superior court' shall, when he decides any question of law or fact, give reasons for the conclusions reached by him.

[25] In terms of s 93*ter*(3)*(c)*, *(d)* and *(e)* of the Magistrates' Courts Act 32 of 1944 it is incumbent on a Magistrates' Court to give reasons for its decisions of fact or law.

[26] Importantly, on the record in the present case there is no indication at all that the imposition of the maximum sentence provided for in s 51 (3) was within the magistrate's contemplation.

[27] In any event, there is a further fatal problem in respect of the sentence of 15 years' imprisonment imposed by the magistrate. In respect of minimum sentence provisions our courts have insisted that particularly unrepresented accused be informed of their implications. Although the appellant was represented, it is clear from the record that there is no indication at all that the magistrate considered imposing the maximum sentence. The appellant's legal representative could consequently not have been invited to make submissions in this regard.[5]

[28] The safeguards in relation to minimum sentences must *a fortiori* apply to the contemplated imposition of a maximum sentence. In relation to motivating the imposition of a maximum sentence it is necessary to have regard to what was stated in *S v Mbatha* 2009 (2) SACR 623 (KZP) (at 631*f-j*):

'On that approach there is as much a necessity for the court in its judgment on sentence to identify on the record the aggravating circumstances that take the case out of the ordinary, as there is for it in the converse situation to identify those substantial and compelling circumstances that warrant the imposition of a lesser sentence than the prescribed minimum. The trial judge should identify the circumstances that impel her or him

[4] *SALJ* op cit at 118.
[5] *S v Ndlovu* 2003 (1) SACR 331 (SCA) paras 13-14; *S v Mvelase* 2004 (2) SACR 531 (W) at 534-535; *S v Ndlovu* 2004 (2) SACR 70 (W) at 76; *S v Legoa* 2003 (1) SACR 13 (SCA) at 25 para 27.

to impose a sentence greater than the prescribed minimum and explain why they render the particular case one where a departure from the prescribed sentence is justified. The factors that render the accused more morally blameworthy must be clearly articulated. . . . Otherwise the whole purpose of a reasonably consistent and standardised approach to sentence in the case of the most serious crimes will be defeated, as it will open to those judges who have particularly stern views on sentence, and regard Parliament's response to serious crime as inadequate, to impose those views in disregard of the purpose of the legislation.'

In the result in that case the sentence was set aside on the basis of that irregularity.

[29] In the present matter the requirements set out in the immediately preceding paragraphs were not met. The magistrate's present speculative articulation is unhelpful.[6] The consequence is that the maximum sentence imposed is liable to be set aside. We have been informed by counsel that the appellant has already been released on parole. It was submitted on his behalf that the setting aside of the sentence will have a practical effect on whether parole conditions will continue to apply. That is a question that is not necessary for us to consider.

[30] In light of the conclusions reached, the following order is made:

1. The appeal against convictions is dismissed.
2. The appeal against sentence is successful to the extent reflected hereafter.
3 The order of the court below in respect of sentence is set aside and substituted as follows:

'The magistrate's order in relation to sentence is set aside and substituted as follows:

"(a) In respect of count 1 the appellant is sentenced to ten years' imprisonment.

(b) In respect of count 4 the appellant is sentenced to five years' imprisonment.

(c) Four years of the sentence set out in (b) is to run concurrently with the sentence referred to in (a)." '

[6] In *Jefferies v Komgha Divisional Council* 1958 (1) 240 (A) at 240G-H this court excluded reasons provided subsequent to the appeal being lodged and stated that it was confined to the four corners of the record.

(d) The sentence is antedated to 4 June 2002.

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M S NAVSA
JUDGE OF APPEAL

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Z L L TSHIQI
JUDGE OF APPEAL

APPEARANCES

APPELLANT: A VAN WYK

Instructed by Legal Aid Board, Pretoria;

Legal Aid Board, Bloemfontein

RESPONDENT: A COETZEE

Instructed by Director of Public Prosecutions, Pretoria;