SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 527/2018

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS
LIMPOPO **APPELLANT**

and

KOKETSO MOTLOUTSI **RESPONDENT**

Neutral citation: *The Director of Public Prosecutions, Limpopo v Motloutsi* (527/2018) [2018] ZASCA 182 (04 December 2018)

Coram: Tshiqi, Swain and Dambuza JJA, Mokgohloa and Mothle AJJA

Heard: 01 November 2018

Delivered: 04 December 2018

Summary: Rape-Prescribed Minimum Sentence-whether respondent's personal circumstances constituted substantial and compelling circumstances-no evidence that the respondent's personal circumstances influenced his conduct-sentence for rape increased on appeal to 10 years' imprisonment.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Phatudi J, sitting as court of first instance):

1 The appeal against sentence is upheld and the sentence imposed by the trial court in respect of Count 2 (rape) is set aside and replaced with the following:

'On count 2 (rape) the accused is sentenced to 10 years' imprisonment'.

2 The above sentence is antedated to 14 August 2017, being the date upon which sentence was originally imposed.

JUDGMENT

Mokgohloa AJA (Tshiqi, Swain and Dambuza JJA and Mothle AJA):

[1] The respondent was indicted in the Limpopo Division of the High Court, Polokwane, on three counts, namely that of housebreaking with intent to rob (Count 1), rape read with s 51 (1) of the Criminal Law Amendment Act (Minimum Sentences Act)[1] (Count 2), and robbery (Count 3). At the commencement of the trial the respondent tendered a plea of guilty to rape in terms of s 51 (2) of the Minimum Sentences Act and theft in respect of robbery. In summary, the respondent admitted that he entered the complainant's room, raped her and stole certain items. He, however, stated that he committed these offences alone. The prosecutor did not accept the plea in respect of rape. The trial court then changed the respondent's plea of guilty to not guilty in terms of s 113 of Criminal Procedure Act (CPA).[2] The contents of his plea were recorded as formal admissions in terms of s 220 of the CPA.

[1] Criminal Law Amendment Act 105 of 1997.
[2] Criminal Procedure Act 51 of 1977.

[2] The trial proceeded and the prosecutor led the evidence of the complainant she testified that during the night of 7 May 2016 she was asleep in her room. She heard a loud bang on the door. She opened her eyes and saw two males inside her room. One of them approached her while she was still on her bed. He sat on the bed and started to touch her. He instructed her to take off her clothes. The complainant refused. He then undressed her and raped her while the other male was busy searching her room. After the first male raped her, the second one approached her and raped her. Thereafter, both males searched her room and took her laptop, cellphone, money and two of her necklaces. They left. This incident occurred during the night in a dark room and the complainant could not identify either of her attackers.

[3] DNA tests results which implicated the respondent in these offences were handed in. The respondent did not testify and closed his case. He was convicted of theft and rape in terms of s 51 (2) of the Minimum Sentences Act (in terms of his plea).

[4] The prosecutor called the complainant who testified in aggravation of sentence. She stated that at the time of this incident, she was a student at the University of Limpopo in the faculty of Information Studies. She could not concentrate in her studies after the rape and failed one module.

[5] The respondent elected not to testify in mitigation and no evidence was led on his behalf. His personal circumstances were placed on record from the bar: that he was 19 years old at the time of the commission of the offences, he was a first offender in respect of rape and he was still at school doing Grade 10. He is an orphan and was raised by his aunt. He was under the influence of liquor when he committed these offences, he spent a period of a year in custody awaiting trial, he was remorseful, and the complainant did not suffer any injuries.

[6] Regarding these personal circumstances of the respondent, the trial court stated:

'. . .[W]hen you committed the offence in May or so of 2016, you were only 19 years old and . . . the Courts regard a person of this age to be fairly young'.

The trial court went further and stated:

'Your level of education is not that sophisticated, you went up to grade 10, that could be because of financial constraints running in your family because you are an orphan. You were raised by your aunt probably out of social grant and pensions alternatively'.

As regards the respondent's state of sobriety, the trial court stated:

'We are told that on the day in question you have consumed alcohol and it ran to your waist, that is why you went into the complainant's room . . .'

Referring to the respondent's plea, the trial court stated:

'By pleading guilty it's an indication that you were remorseful and according to the DNA results there is no indication of forceful penetration.'

[7] The trial court held that the respondent's personal circumstances, justified the imposition of a lesser sentence than the prescribed minimum sentence. He was sentenced to 12 months' imprisonment in respect of theft and five years' imprisonment in terms of s 276 1(i) of the CPA in respect of rape. The sentences were ordered to run concurrently.

[8] Aggrieved by the sentence imposed in respect of the rape, the Director of Public Prosecutions (the DPP) appealed in terms of s 316B of the CPA, leave having been granted on petition by this court. The basis of the appeal was that the sentence was too lenient.

[9] The respondent's conviction of rape rendered him liable for punishment under s 51(2) of the Minimum Sentences Act which prescribe a minimum sentence of 10 years' imprisonment, unless substantial and compelling circumstances are found to be present.

[10] The DPP contends, in essence, that the trial court had misdirected itself in concluding that there were substantial and compelling circumstances which justified the imposition of a lesser sentence than the prescribed minimum sentence. Counsel for the respondent, on the other hand, argued in support of the correctness of the trial court's findings in respect of the substantial and compelling circumstances and submitted that the sentence imposed was appropriate.

[11] The question is whether, given the facts of this case, the trial court was correct in its conclusion that the personal circumstances of the respondent amounted to substantial and compelling circumstances that justified the imposition of a lesser sentence than the prescribed one of 10 years' imprisonment. Ponnan JA, referring to *S v Malgas*[3], stated the following in *S v Matyityi*[4]:

'Malgas, which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached, and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from Malgas: the fact that Parliament had enacted the minimum sentence legislation was an indication that it is no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present.'

The trial court erred in finding that the following constituted substantial and compelling circumstances justifying the deviation from the prescribed sentence.

[12] It is settled that the younger the offender, the clearer the evidence needs to be about his background, education, level of intelligence, and mental capacity, in order to enable a court to determine the level of maturity and therefore moral

[3] *S v Malgas* 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222; [2001] 3 All SA 220.
[4] *S v Matyityi* 2011 (1) SACR 40 at 46d-e

blameworthiness.[5] As stated earlier, the respondent did not testify. It appears from the record of the proceedings that his aunt was present in court. She was however not called to testify and give clearer evidence about the respondent's background and upbringing. There was therefore no evidence as to how the personal circumstances of the respondent influenced his conduct.

[13] In his formal admissions, the respondent stated that although he had consumed alcohol on the night of the incident, he was able to comprehend and appreciate the consequences of his actions. There is therefore no evidence, and his counsel did not argue, that the consumption of alcohol impaired his mental judgment and diminished his moral blameworthiness to the extent that it may be regarded as substantial and compelling circumstance.

[14] Remorse is an important consideration in sentencing. However, genuine remorse must be distinguished from self-pity and an unavoidable acknowledgment of guilt because the evidence against the accused is overwhelming. Before remorse can be a valid factor in the imposition of sentence, it has to be sincere and the accused must take the court into his or her confidence. In *S v Barnard*[6] the court held that a plea of guilty in the face of an open and shut case against the accused is a neutral factor.

[15] The fact that the respondent pleaded guilty is not in itself an indication of remorse. He failed to reveal his complicity to the police during the year before the trial commenced. The evidence linking him to the crime was overwhelming DNA evidence. The other factor that militates against a conclusion that the respondent has shown genuine remorse is his decision not testify in mitigation of sentence. His evidence would have demonstrated his candour, by subjecting his

[5] *S v Lehnberg en 'n Ander* 1975 (4) SA 553 (A) at 561 A-C.
[6] *S v Barnard* 2004 (1) SACR 191 (SCA) at 197.

personal circumstances to the scrutiny of cross examination. This may have assisted him in bringing to the court's attention information about his background and upbringing, to enable the court to make a determination regarding his level of maturity and therefore his moral blameworthiness. I find that the respondent pleaded guilty in the face of overwhelming DNA evidence.

[16] Section 51(3) (aA) of the Minimum Sentences Act provides that when imposing sentence in respect of the offence of rape the apparent lack of physical injuries on the complainant shall not constitute substantial and compelling circumstances. In *S v Nkawu*[7] the court interpreted s 51(3) (aA) to mean that the fact that the complainant in a rape case did not suffer serious or permanent injuries may not, on its own, be regarded as a substantial and compelling circumstance justifying deviation from the prescribed sentence, but may, together with other factors cumulatively be considered, amount to substantial circumstances.

[17] In *S v Mahomotsa*[8] this Court stated:

'While it may theoretically be possible that a victim of rape committed in the circumstances and manner I have described may not suffer any psychological damage other than that experienced while the attack is taking place and in its immediate aftermath, it is in the highest degree unlikely. Where as here, the complainants were young girls, it is quite unrealistic to suppose that there will be no psychological harm.'

[18] I agree with the DPP that the trial court attached insufficient weight to the seriousness of the offence and the interests of society. Rape is a very serious offence 'constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.'[9] It is a horrifying crime and a cruel and selfish act in which the aggressor treats with the utmost contempt the

[7] *S v Nkawu* 2009 (2) SACR 402 (ECG).
[8] *S v Mahomotsa* 2002 (2) SACR 435 (SCA) para 11.
[9] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5b.

dignity and feelings of the victim.[10] As stated in *Chapman*, women in this country have a legitimate claim '. . . to enjoy the peace and tranquility of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives'. The complainant in the present matter was sleeping in the safety of her own room. The respondent barged into her room, stole from her and raped her.

[19] The trial court failed to take into consideration the three elements that are necessary when determining a proper sentence. These elements as enunciated in *S v Zinn*[11] consist of the offence, the offender and the interests of society. A court should strike a judicious balance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of other elements. To achieve this counterbalance a court must evaluate and evenly balance the nature and the circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concerns.[12] I find that the trial court unduly emphasised the personal circumstances of the respondent at the expense of the seriousness of the offence and the interests of society.

[20] The respondent's background is not unique and cannot justify his callous deeds. There are many persons with similar and more challenging backgrounds who do not resort to crime and who live as good citizens, respecting the law and rights of their fellow human beings.

[21] I am mindful of the fact that sentencing is always within the discretion of the trial court and that this court can only interfere where there has been an irregularity that results in a failure of justice. The sentence of five years

[10] *N v T* 1994 (1) SA 862 (C).
[11] *S v Zinn* 1969 (2) SA 537 (A).
[12] *S v Banda & others* 1991 (2) SA 352 at 355A-C.

imprisonment in terms of s 276 (1)(i) of the CPA imposed by the trial court is so disproportionate and shocking, that no reasonable court could have imposed it. The sentence undermines public confidence in the criminal justice system and has to be set aside and replaced with the minimum sentence of 10 years' imprisonment.

[22] Regrettably, it is necessary to comment on the manner in which the presiding judge conducted the proceedings. As pointed out above, the respondent was charged with contravening s 51 (1) of the Minimum Sentences Act, where it is alleged that the complainant was raped more than once. The respondent however tendered a plea of guilty to contravening s 51(2) of the Minimum Sentences Act, which deals with the situation where a single rape is alleged.

[23] The respondent in his plea explanation made no mention of any other person being involved in the crimes to which he had pleaded guilty.
When Phatudi J asked the prosecutor whether he accepted the plea, the prosecutor asked for clarity on whether the plea of guilty to the charge of rape, was in terms of s 51(1) or s 51(2) of the Minimum Sentences Act. This reasonable request then led to the following discussion between Phatudi J, the prosecutor Mr Chauke, and the defense counsel Mr Kgatle:

'Court: Alright, Mr Kgatle, do you wish to clarify whether this is 51(1) or 51(2)?

Mr Kgatle: M'Lord, in as far as, my instructions are concerned, it remains 51(2) and I would submit that if there was any other person involved or companion, he would have been…

Court: Arrested.

Mr Kgatle: … in court facing the same charges and it will be clear from the court that, indeed, there are two people who are facing same charge as gang rape, as it is submitted by my learned colleague, here we are having only one accused.

Court: And he admits, in so far as, as I'm concerned.

Mr Kgatle: And he is admitting his conduct, he cannot admit and answer the allegations on behalf of any other person…

Court: Who is not before court.

Mr Kgatle: That would very unfair and unconstitutional, hence we are standing by our statement that it refers to only this accused before the court.

Court: Yes.

Mr Kgatle: As the Court pleases.

Court: Mr Chauke, you know what let us not complicate issues here, where is the other accused to say that there was more than one accused?

Mr Chauke: He is unknown.

Court: Ja, why do you say that you don't accept what he says?

Mr Chauke: But the facts which we have indicated that two people raped the complainant.

Court: Ja, if that person is unknown, the witness, what is she going to say, will she identify that person, it means it is an unknown man, so even if I can say alright call your witness, what is she going to say?

Mr Chauke: Yes, that will be get later whether if a gang rape was committed by more than one person and only one is before court, it does not fall within Section …[intervention]

Court: But I'm saying if you say the other accused or suspect or whoever is "unknown"?

Mr Chauke: Yes

Court: And if the complainant knew this person, this would be before court?

Mr Chauke: Yes.

Court: Now what are we trying to achieve because what are you going to say because if she doesn't know the assailant – if she knows the assailant, the assailant should have been before court.

Mr Chauke: That's my …[intervention]

Court: If she does not know the other party what is she going to say in evidence?

Mr Chauke: No, my point is on sentencing we know that an offence of rape is either …[intervention]

Court: So you are looking at – yes, you are looking at that but remember that is in the court's discretion.

Mr Chauke: Yes, it is …[Intervention]

Court: So if the complainant does not know who the other party is, why must he plead guilty to something which is – it's not going to work at the end.

Mr Chauke: Yes, the issue of a plea it is up to him, it has nothing to do with the State, the State only has to bring evidence to prove the offence is Section 51(1) or Section 51(2), simply as that.

Court: Okay, I don't want to be seen to be entering the arena, its fine, you are the *dominus litis* but remember that there are rights here enshrined in the constitution, you know very well. Anyway, fine thank you.'

[24] It is clear that Phatudi J in questioning the prosecutor exceeded the bounds of what was reasonable in order for him to understand why the prosecutor refused to accept the plea, as tendered. The prosecutor was subjected to undue pressure to accept the plea tendered, simply because Phatudi J believed that because the complainant was unable to identify the other assailant, a plea of guilty to a single rape should be accepted by the prosecutor. In doing so, he failed to have regard to his own admonition not to enter the arena.

[25] Phatudi J then proceeded to accept the respondent's plea of guilty to theft on count 3, but entered a plea of not guilty to rape in respect of count 2, as he was obliged to do, as the prosecutor did not accept the plea of guilty tendered on that count. The prosecutor then led the evidence of the complainant on the rape charge in which she stated that she was raped by two individuals, but she was unable to identify either of them. She was subjected to cursory cross-examination, the object of which seems to have been to cast doubt on her evidence that she was raped by two persons, but which failed in any way to affect her credibility. The defence case was then closed without the respondent giving evidence, with the result that the complainant's evidence that she was raped by two persons, stood unchallenged.

[26] The preconceived view held by Phatudi J as to the weight to be attached to the evidence of the complainant that she was raped by two persons, then unfortunately and erroneously found expression in his judgment. He rejected the complainant's evidence on this issue simply on the basis that according to the DNA evidence there was 'no indication that any other person except the accused

penetrated the complainant.' He reached this conclusion on the basis that the DNA evidence excluded a certain Mr Ntabani Matsatsi as the donor of the DNA in the exhibits, with the result that 'serious doubt' was cast upon 'the credibility of the complainant as to how many people were actually involved in the rape.' The erroneous reasoning of Phatudi J is self-evident. The fact that the DNA evidence excluded Mr Matsatsi could not affect the complainant's credibility, when there was no evidence that she had ever identified him as one of her assailants. To the contrary, her evidence was that she was unable to identify either of her assailants. In addition, this evidence obviously could not exclude the participation of an unidentified person in the rape.

[27] Although the appeal only concerns the sentence imposed upon the respondent in terms of s 51 (2) of the Minimum Sentences Act, it has been necessary to deal with the manner in which Phatudi J concluded that the complainant was only raped once. This is because this case serves as a stark reminder of the danger of a judicial officer forming a preconceived erroneous view on a particular issue and thereafter imposing that view on counsel, without affording a proper opportunity to counsel to persuade him or her, to the contrary.

[28] In the result the following order is granted:

1 The appeal against sentence is upheld and the sentence imposed by the trial court in respect of Count 2 (rape) is set aside and replaced with the following:

'On count 2 (rape) the accused is sentenced to 10 years' imprisonment'.

2 The above sentence is antedated to 14 August 2017, being the date upon which sentence was originally imposed.

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FE MOKGOHLOA

ACTING JUDGE OF APPEAL

APPEARANCES

For the Appellants:	C Chauke
Instructed by:	Director of Public Prosecutions, Limpopo
	Director of Public Prosecutions, Bloemfontein
For the Respondent:	LM Manzini
Instructed by:	Legal Aid South Africa, Polokwane
	Legal Aid South Africa, Bloemfontein