SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1171/18

In the matter between:

SIPHO XIMBA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Sipho Ximba v The State* (1171/18) [2019] ZASCA 111 (16 September 2019)

Coram: Maya P, Zondi and Mokgohloa JJA and Dolamo and Hughes AJJA

Heard: 16 August 2019

Delivered: 16 September 2019

Summary: Criminal Procedure – sentence – whether substantial and compelling circumstances exist to justify deviation from the prescribed minimum sentence – no misdirection by the trial court and full bench – appeal dismissed.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Balton and D Pillay JJ sitting as the court of appeal).

The appeal is dismissed.

JUDGMENT

Mokgohloa JA (Maya P and Zondi JA and Dolamo and Hughes AJJA concurring):

[1] The appellant was arraigned and convicted in the regional court Ezakheni, KwaZulu- Natal (Additional Magistrate Qwabe), on a charge of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] read with s 51 of the Criminal Law Amendment Act (the CLAA).[2] Having found that no substantial and compelling circumstances existed, the trial court sentenced him to life imprisonment. His appeal against conviction and sentence was dismissed by the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Balton and D Pillay JJ). Special leave to appeal was granted by this Court on sentence only.

[2] The issue before this Court is whether the trial court erred in its conclusion that there existed no substantial and compelling circumstances that justified a deviation from the prescribed minimum sentence of life imprisonment in respect of the conviction of rape where the victim was raped repeatedly.

[1] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[2] Criminal Law Amendment Act 105 of 1997.

[3] Before turning to consider whether the sentence imposed on the appellant was appropriate, a brief consideration of the background facts is necessary. On 7 March 2009 around 3h00, the 26 year old complainant was asleep in her room in her shack situated at Steadville. She heard loud banging on the door of her shack. The door, which was locked with an iron rod, was then broken and the appellant, whom she knew and whom had previously propositioned her, entered her room. He spat on her face slapped her, called her a bitch and asked how long must he propose love to her. He then pushed her onto the bed, removed her panties and raped her. The appellant made the complainant to change positions and raped her four times. He also threatened to gouge out her eyes. At some stage, the appellant stopped raping her and took a knife from a nearby cupboard. The complainant, wearing only her pyjama top, then ran out of the room to seek help from the neighbours. The appellant chased and caught her. He pressed her against the wall of her shack and spat on her face again. He also demanded her cellphone, which she had hidden in her pyjama sleeve. He pulled her back to the room where he threw her on the bed, stuck his tongue in her mouth and continued to rape her. The rape continued until 7h30 when the appellant instructed the complainant to pack her belongings and go home with him. He wanted to give her money but she rejected the offer. As they were walking, the appellant threatened to kill her if she reported the rape to the police. They parted ways at a nearby tuck shop as she asked to visit someone and promised to return to him in the afternoon.

[4] The complainant proceeded to a nearby hostel and reported the incident to Ms Nokuthula Khumalo. The police were called and she was taken to hospital. The medical report confirmed that the complainant's vagina was bruised and bleeding. The appellant denied the incident when he was charged with the rape and insisted that the complainant was falsely

implicating him. He raised an alibi that he was at his home with his girlfriend on the night in question.

[5] The rape in this matter falls within the ambit of s 51(1) of the CLAA, which prescribes a minimum sentence of life imprisonment in circumstances where the victim was raped more than once, unless there exist substantial and compelling circumstances that justify deviation from the prescribed sentence.

[6] Before us, counsel for the appellant submitted that the trial court misdirected itself when it found that there existed no substantial and compelling circumstances justifying deviation from the prescribed sentence of life imprisonment. Counsel also drew attention to the appellant's personal circumstances, namely, that he was 29 years old, a first offender, single with three minor children and was gainfully employed. She submitted that these factors, cumulatively taken, constituted substantial and compelling circumstances. She further submitted that this was not the worst kind of rape and that no evidence was led relating to the extent of the complainant's trauma after the rape. According to her, the trial court over-emphasised the seriousness and prevalence of the offence above the appellant's personal circumstances and thereby left no room for mercy in his sentencing.

[7] It is, therefore, necessary to assess whether the trial court misdirected itself in finding that no substantial and compelling circumstances existed that warranted a lesser sentence than that prescribed. In *S v Malgas*[3] this

[3] *S v Malgas* 2001 (1) SACR 469 (SCA); [2001] 3 All SA 220 (A) para 18.

Court set out how a court should conduct an enquiry as to whether substantial and compelling circumstances are present as follows:

'[18] Here lies the rub. Somewhere between these two extremes the intention of the legislature is located and must be found. The absence of any pertinent guidance from the legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling or what should not, does not make the task any easier. That it has refrained from giving such guidance as was done in Minnesota from whence the concept ''substantial and compelling circumstances'' was derived is significant. It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentence as being *generally appropriate* for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to circumstances which may be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many.'

[8] Ordinarily, sentencing is within the discretion of the trial court. An appeal court can only interfere with the sentence imposed if the trial court misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.[4]

[9] Rape, a highly endemic crime in South Africa, is undeniably a horrific, cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of the victim.[5] It was described in *S v Chapman* as 'a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'.[6] Its gravity in this case is

[4] *Bogaards v S* [2012] ZACC 23 (CC); 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) para 41.
[5] *N v T* [1994] (1) All SA 496 (C); 1994 (1) SA 862 (C) at 864G.
[6] *S v Chapman* 1997 (2) SACR 3 (SCA); [1997] 3 All SA 277 at 278.

aggravated by the fact that the complainant was attacked in the sanctity of her own home. The appellant forced entry into her home, treated her with utter disregard by insulting her, spitting in her face, threatening to gouge out her eyes and kill her, forcing her to run outside half naked and subjecting her to a horrific ordeal that lasted for hours. The rape was so brutal that the complainant, who had children and was sexually active, bled profusely after the rape to the extent that her skirt was bloodied and such that she had to be given a sanitary pad at the hospital. The appellant continued to humiliate and terrorise her by forcing her to accompany him in the morning, taking her where he willed in blood-stained clothes. The complainant suffered physical injury and emotional trauma. Even though she received counselling, the emotional scars will remain with her for a long time. I certainly find this to be the worst rape.

[10] In sentencing the appellant, the trial court took into consideration his personal circumstances, the nature and seriousness of the offence as well as the interests of society. It found, correctly so in my view, that the personal circumstances of the appellant do not constitute substantial and compelling circumstances justifying deviation from the prescribed sentence of life imprisonment. His personal circumstances paled into insignificance when compared to the seriousness and brutality of the offence.

[11] There is, accordingly, no basis on which to find that the sentence imposed by the trial court is disproportionate or shocking and that no other court would have imposed such a sentence. This Court is, therefore, not entitled to interfere with the sentence imposed by the trial court. The appeal must accordingly fail.

[12] The following order is made:

The appeal is dismissed.

FE Mokgohloa

Judge of Appeal

APPEARANCES:

For Appellant:	P Andrews
Instructed by:	Justice Centre, Pietermaritzburg
	Legal Aid, Bloemfontein
For Respondent:	D Naicker
Instructed by:	The Director of Public Prosecutions, Pietermaritzburg
	The Supreme Court of Appeal, Bloemfontein